Supreme Court of the United States

OCTOBER TERM, 1966

No. 222

EDWARD JOHN NOWAKOWSKI, PETITIONER

vs.

JAMES F. MARONEY, Superintendent, State Correctional Institution

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Persons in State Custody

Case No. 64-1087 Civ.

(To be supplied by the Clerk of the District Court)

EDWARD JOHN NOWAKOWSKI - C-7409

Full name and prison number (if any) of Petitioner

v.

JAMES F. MARONEY

Name of Respondent

PETITION FOR A WRIT OF HABEAS CORPUS—Filed October 12, 1964

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner

will be unable to pay the fees and costs of the habeas corpus proceeding. When the petition is completed, *the original and four copies,* as required by Rule 16 of the local Rules of Court, shall be mailed to the Clerk of the District Court for the Western District of Pennsylvania.

[fol. 2]

1. Place of detention Western State Correction Institution, Pittsburg 33, Pa.
2. Name and address of the person in whose custody the prisoner is detained:

   James F. Maroney, Western State Correction Institution—Pittsburg 33, Pa.
3. Name and location of court which imposed sentence:

   Oyer and Terminer—Erie County, Erie, Pa.
4. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) No. 10 September Term 1957.
   (b)
   (c)
5. The date upon which sentence was imposed and the terms of the sentence:

   (a) September 16, 1957 Three (3) to Seven (7) Years.
   (b)
   (c)
6. Check whether a finding of guilty was made.

   (a) after a plea of guilty
   (b) after a plea of not guilty B.
   (c) after a plea of nolo contendere
7. If you were found guilty after a plea of not guilty, check whether that finding was made by

   (a) a jury A.
   (b) a judge without a jury
8. Did you appeal from the judgment of conviction or the imposition of sentence? No.

9. If you answered "yes" to (8), list

(a) the name of each court to which you appealed:

i.
ii.
iii.

(b) the result in each such court to which you appealed:

i.
ii.
iii.

(c) the date of each such result:

i.
ii.
iii.

[fol. 3]

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.
ii.
iii.

10. If you answered "no" to (8), state your reasons for not so appealing:

(a) Court appointed counsel, Thomas P. Mangan, refused to appeal, his answer, "Whats the Use," Douglas Smith statement is against us.
(b) I asked the District Attorney, Herbert Johnson, I want to file an appeal for a new trial, and he said, "I had a fair trial.
(c)

11. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Perjury.
(b) Ineffective aid, and assistance of counsel.
(c) Two commonwealth were permitted to informally talk, with a commonwealth witness.

12. State concisely and in the same order the facts which support each of the grounds set out in (11):

(a) Perjured statement of Douglas Smith. State witness who later was convicted for perjury.
(b) Ineffective aid and assistance of counsel.
(c) State witness (Joseph Corcoran) conversed with the jury during a recess of the trial.

13. Prior to this petition have you filed with respect to this conviction

(a) any petitions in State or Federal courts for habeas corpus? Yes
(b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (9)? No
(c) any other petitions, motions or applications in this or any other court? Yes

14. If you answered "yes" to any part of (13), list with respect to each petition, motion or application

[fol. 4]

(a) the specific nature thereof:

i. Writ of Habeas Corpus No. 212 May Term 1959
ii. Writ of Habeas Corpus No. 575 September Term 1959
iii. Writ of Habeas Corpus No. 376 May Term 1960
iv. Appeal from Dismissal for Writ of Habeas Corpus No. 247 April 1960

(b) the name and location of the court in which each was filed:

i. Court of Common Pleas, Erie County, Erie, Pa.
ii. Court of Common Pleas, Erie County, Erie, Pa.
iii. Court of Common Pleas, Erie County, Erie, Pa.
iv. Superior Court of Pennsylvania, Pittsburg, Pa.

(c) the disposition thereof:

i. Denied
ii. Denied
iii. Denied
iv. Denied

(d) the date of each such disposition:

i. April 1, 1959
ii. August 25, 1959
iii. April 30, 1960
iv. December 14, 1960

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Petition Denied
ii. Petition Denied
iii. Petition Denied
iv. Affirmed (other side of page)

[fol. 5]

(a) The specific nature thereof:

v. Writ of Habeas Corpus. No. 82 May Term 1962.
vi. Writ of Habeas Corpus. No. 420 September Term 1963.
vii. Appeal from Dismissial for Writ of Habeas Corpus, No. 247 April Term 1963,
viii. Petition for Permission to Proceed. File, and Prosecute Appeal In Forma Pauperis.
ix. Writ of Habeas Corpus. Civil File No. #64-364.

(b) The name and location of the court in which each was filed:

v. Court of Common Pleas, Erie County, Erie, Pa.
vi. Court of Common Pleas, Erie County, Erie, Pa.
vii. Superior Court of Pennsylvania, Pittsburg, Pa.
viii. Supreme Court of Pennsylvania, Harrisburg, Pa.
ix. United States District Court, Western District of Pennsylvania, Pittsburg, Pa.

(c) The disposition thereof:

v. Denied
vi. Denied
vii. Denied
viii. Denied
ix. Denied

(d) The date of each such disposition:

v. February 23, 1962
vi. July 12, 1963
vii. December 12, 1963
viii. February 26, 1964
ix. April 17, 1964

(e) If known, any citations of any written opinions, or orders entered pursuant to each such disposition:

v. Petition Denied
vi. Petition Denied
vii. Affirmed
viii. Petition Denied
ix. Dismissed for Failure to Show Exhaustion of State Remedies

[fol. 4 cont.]

15. Has any ground set forth in (11) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

16. If you answered "yes" to (15), identify

(a) which grounds have been previously presented:

i. Perjury
ii. Ineffective aid and assistance of counsel
iii. State witness conversing with two jury members

(b) the proceedings in which each ground was raised, and the court in which each ground was raised:

[fol. 6]

i. Writ of Habeas Corpus. No. 376 May 1960. Common Pleas, Erie, Pa.
ii. Writ of Habeas Corpus. No. 376 May 1960. Common Pleas, Erie, Pa.
iii. Writ of Habeas Corpus. No. 376 May 1960. Common Pleas, Erie, Pa.

(c) the disposition made in the proceedings of 16(b) of the grounds set forth in 16(a):

i. Denied
ii. Denied
iii. Denied

17. If you answered "yes" to (15), attach copies of any petition, motion or application so filed.

18. If any ground set forth in (11) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)
(b)
(c)

19. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? No
(b) your trial, if any? Yes
(c) your sentencing?
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

20. If you answered "yes" to one or more parts of (19), list

(a) the name and address of each attorney who represented you:

i. Thomas P. Mangan, Esq. 1004 Palace Hardward Bldg., Erie Pa.
ii.
iii.

(b) the proceedings at which each such attorney represented you:

i. At trial
ii.
iii.

[fol. 7]

20. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1, of this form)? Yes

/s/ Edward John Nowakowski
Signature of Petitioner

[*Duly sworn to by Edward John Nowakowski jurat omitted in printing (all in italics)*]

[fol. 8] FORMA PAUPERIS AFFIDAVIT

(see instructions, page 1 of this form)

Petitioner is a poor person, having no cash, bonds, or savings, in excess of thirty eight dollars, is in prison, and has no income in any way sufficient to pay all or part of the fees or cost of this, action.

/s/ Edward John Nowakowski
Signature of Petitioner

[*Duly sworn to by Edward John Nowakowski jurat omitted in printing (all in italics)*]

[fol. 9]

EXHIBIT AE TO PETITION FOR A WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil File No. 64-364

Habeas Corpus ——— No.

UNITED STATES OF AMERICA EX REL. EDWARD JOHN NOWAKOWSKI, PETITIONER

- *vs* -

JAMES F. MARONEY, RESPONDENT

"Petition for a Writ of Habeas Corpus Ad Subjiciendum"

To the Honorable Judges of said Court:

The Petitioner Edward John Nowakowski, the Petitioner and relator in persona, respectfully represents.

1. That the Petitioner herein, is a citizen of United States of America, of birth and legal age.
2. That, JAMES F. MARONEY, the respondent herein is the Superintendent of the State Correctional Institution at Pittsburgh, Pennsylvania.
3. That the petitioner is in the custody of the respondent and is confined by him of virtue of commitment for the crime of Burglary.
4. That the petitioner is unjustly and unlawfully imprisoned and confined and restrained of his liberty of three (3) to seven (7) years imprisonment.
5. That petitioner was arrested and indicted at Number, 10 September Term, 1957, in the court of Oyer and Terminer at Erie, Pennsylvania.
6. That petitioner entered a plea of Not Guilty to all counts and stood trial by jury.

7. That said trial resulted in verdict of guilty of the crime of Burglary on September 16, 1957.

8. That petitioner has petitioned for relief by Habeas Corpus, and appeal to the Common Pleas Court, Erie, Pennsylvania, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania, all to no avail.

9. That petitioner can not obtain Justice or a fair hearing upon his allegations in the State Courts of Pennsylvania.

[fol. 10]

10. That your petitioner was deprived of his constitutional rights to due process of law as guaranteed to him by the Constitution of United States, #14 Amendment thereto in the following particulars:

A. The Commonwealth failed to prove by any competent evidence, that your petitioner was guilty of the offense he is now imprisoned upon.

B. The conviction does not rest upon any evidence adduced by the Commonwealth which would support the findings of guilt, of the offense he was convicted upon.

C. The trial was unfair to the extent that there was a denial of due process.

D. The conviction was supported solely upon tainted testimony, whereby the Commonwealth supported its case upon the statement of an admitted perjurer.

E. That petitioner was convicted upon the unsupported statement of an alleged accomplice who was subsequently convicted of perjury relative to his appearance at petitioners trial.

F. That petitioner was denied the opportunity and right to have a defense witness at his trial, whereas, said witness testimony would of cleared petitioner of the charge.

G. That court appointed counsel failed to prepare petitioners case for the trial, whereby, counsel did not render effective aid or assistance.

H. That court appointed counsel failed in his duty to conduct a competent defense and protect the rights of petitioner to a fair trial.

I. That the trial court failed to make an effective appointment of counsel as law and Justice demands.

J. That the placing of Douglas Smith an alleged accomplice upon the stand at petitioners trial was highly prejudicial which acted as a bar to a fair and impartrial trial.

K. That petitioner was denied the right to appeal his sentence of conviction to a higher court.

[fol. 11] STATEMENT OF FACTS

Petitioner respectfully represents that he was arrested for the crime of Burglary,—Larceny,—Receiving Stolen Goods, the crime alleged to have been committed on July 13, 1957.

On September 16, 1957, at No. 10 September Term, 1957, the Petitioner was convicted by a jury.

The sentence of the court was that petitioner be imprisoned for a term of three (3) to seven (7) years, whereas he is now serving said Judgment.

"SUMMARY OF THE CASE"

At petitioners trial, he was represented by court appointed counsel, namely Thomas P. Mangan.

The only evidence presented at the trial was a signed statement by one, Douglas Smith, that he and your petitioner had committed the burglary. The said Douglas Smith recanted his statement. At the preliminary hearing petitioner asked on at least three occasions that he be permitted to call a lawyer, but was told he didn't need a lawyer. Petitioner asked if he could have a witness called to testify in his behalf, but was told no. The only evidence at the hearing was a statement one Douglas Smith had made implicating himself and your petitioner. Petitioner entered a plea of not guilty.

Petitioner was appointed counsel about three days before his trial, but court appointed counsel did not discuss the case with petitioner until the day of the trial. At the

trial the statement of Douglas Smith was introduced, and that was all the evidence the prosecution had. Douglas Smith was called to the witness stand. The first statement he made was, that he did not commit the burglary, whereas, the prosecutor said, "he pleads suprise," and asked for a recess. The Prosecutor took Douglas Smith into the court room of Honorable Elmer Evans, where a trial was going on; whereas said trial was stopped, and [fol. 12] the prosecutor told Judge Evans that Douglas Smith under oath in petitioners trial had stated he was not guilty, but before an aldermans under oath he had previously said he was guilty. Douglas Smith then stated he was not guilty, and petitioner was not guilty, and that he lied about petitioner, that his statement was untrue, and he refuses to testify against himself, and petitioner. The Honorable Elmer Evans then ordered Douglas Smith back into the court room petitioner was on trial in, and ordered him to testify against petitioner. Petitioners trial was resumed, whereas, Douglas Smith, was put back on the stand, and this time he said, he was not guilty, and petitioner was not guilty—The prosecutor once again asked for a recess, and took Douglas Smith into his office. What was said there petitioner cannot say, but he was brought back again and placed on the witness stand at petitioners trial, and then he refused to testify. After some arguing between the prosecutor and Smith, he was dismissed from the stand.

"NOTE" Court appointed counsel entered no objections whatsoever.

Petitioner told his counsel that he had a witness that would swear that he was at her residence at the alleged time of burglary. Counsel made no attempt to notify her before the trial began, but during the last minute of the trial, he did attempt to locate her by telephone. Trial was recessed until the next day, and when the witness did not appear for petitioner, he was told she was out of town.

Whereas your petitioner was found guilty as charged.

[fol. 13]

BRIEF IN SUPPORT OF PETITION

The Petitioner, respectfully represents that his trial lacked essential ingredients to constitute due process of law. That petitioner did not have the effective assistance of counsel at his trial, is supported by an inspection of the trial record, and the further fact, that the trial counsel failed to even prepare a defense, and did not even discuss the case with petitioner, until the day of trial. Counsel failed to summon the only defense witness petitioner had, whereas in effect petitioner was denied his constitutional right to have a witness in his favor at the trial. Trial counsel failed to competently conduct a defense whereby, said counsel failed to even enter an objection to the prejudicial actions of the prosecutor in parading its reluctant witness, Douglas Smith, before the jury in such a prejudicial manner that would ensue an unfair trial.

The court in deciding this case should understand that the sole evidence of the prosecutor was its reluctant witness Douglas Smith. From this view it can be seen why the prosecutor kept parading Douglas Smith before the jury, the prosecutor wish to impress the jury, that Douglas Smith was trying to protect the petitioner and at the same time, set up his own witness to a perjury charge. To this end the prosecutor succeeded. Smith was later convicted of perjury in connection with his sworn statement entered at petitioners trial, and the testimony he offered at said trial.

There can be no denial of the fact that petitioner was convicted solely upon the signed statement of an alleged accomplice, who is also a convicted perjurer. It has been the holding of the lower court that Smith's testimony was favorable to the petitioner, therefore, even though Smith is a convicted perjurer, his testimony was not unfair or prejudicial. This line of reasoning is obviously false, when it is noted that without Smith's statement, the [fol. 14] prosecutor had no evidence whatsoever. Smith's statement was read to the jury, and the fact that he recanted his confession at the trial only strenghed the prosecutors case by inflaming the minds of the jury, to the extent that a fair trial was impossible.

The prosecutor in presenting Smith before the jury perpetrated a fraud upon the defense, and the court. The prosecutor knew that Smith did not wish to testify, as he had decided to plead not guilty to the Burglary charge himself. But because Smith had also implicated petitioner as well as himself in his signed statement, the prosecutor was not inclined to allow his only witness to back out of his signed statement. Smith attempted to invoke his constitutional privilege of self incrimination, but due to his ignorance, intimidations by the prosecutor and a disregard for law and justice by the court, Smith jeopardised himself to a charge of perjury.

The unconstitutionalty of petitioners trial is so apparant that it is a wonder how petitioner has been denied justice so long. Petitioner has been filing petitions for relief in the state courts for many years. The state courts have taken full advantage of petitioners ignorance in denying relief. The lower courts have taken full advantage of the defect in petitioners petitions to deny justice. The only recourse petitioner has left to him is to seek a fair and impartial hearing in the federal courts.

To this end petitioner cites the following cases in support of his petition.

> "Neither the prosecutor nor trial Judge may make use of false statements or unlawful evidence, even though the attorney for the defense erroneously or other wise allowed such use. *Lovejoy* v. *U.S.* 128 U.S. 171; *Pyle* v. *Kansas* 317, U.S. 213, 216

> "A judgment is null and void and in violation of the due process of law clause, in a civil or criminal act on, where it is obtained or maintained by use of [fol. 15] fraud, or false, or perjured evidence, or by suppression of evidence.

> *James* v. *U.S.* 5 Cir. 1949, 175 F. 2d 769; *Hazel Atlas N. Hartford,* 322 U.S. 258.

> "That where it is evident that perjury has been committed at trial, which brought about conviction of defendant, it is a violation of his constitutional rights, and such conviction cannot stand." *Mooney* v.

Hollohan, 294 U.S. 103, 115, 340, 348, *Pyle* v. *Kansas*, 317 U.S. 213, 216, (1943).

In the case of *Mesarosh, Et at* v. *U.S.* 352, U.S. 9, we have a case where tainted testimony caused an unlawful conviction of the defendant. In the instant case it is contented by the state courts, that even though the witness Smith had offered perjured testimony at the trial his testimony was favorable to the petitioner.

To examine this view one must keep in mind that the sole evidence of the prosecutor was a signed statement by Smith implicating petitioner as well as himself, as the ones that committed the Burglary. This signed statement was used by the prosecutor at the trial of petitioner, and during the trial the prosecutor attempted to use Smith as a witness against petitioner since Smith would have equally implicated himself if he was to testify for the prosecution, he attempted to avoid testifying. When he was forced to testify by the Judge and prosecutor, he committed perjury by denying the truth of the sworn statements he had made previously.

The petitioner respectfully represents that placing Smith on the stand at his trial was highly prejudicial to the exclusion of a fair trial. The prosecutor and the Judge knew that Smith would not testify for the prosecutor. The prosecutor and Judge merely used petitioner trial, as a means to bring perjury charges against Smith. The prosecutor already had Smith's sworn statement in writing. The calling of a hostial witness by the prosecutor, could serve no useful purpose, extepting that Smith could be cited for perjury, and the minds of the jury would be inflamed against the petitioner. By such meth- [fol. 16] ods the prosecutor obtained added caedence to his only prosecuting tool, a mere statement made by an admitted accomplice.

The petitioner further respectfully represents that court appointed counsel was so ineffective that petitioners constitutional rights to due process of law was ineffect denied.

> "In *Avery* v. *Alabama*, the court said, The constitutional requirements of counsel is one of substance and not of form. It could not be satisfied by a pro forma

or token appearance. *Avery* v. *Alabama*, 308, U.S. 444, 446, (1940).

Holly v. *Smyth*, 280 F. 2d 536, 542, (4 Cir. 1960).

"Pro forma entry of an appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional rights of an accused.

Turner v. *Maryland*, 303 F. 2d 507, 511, (4 Cir. 1962).

"The importance of reasonable investagation and preparation in determining whether challanged representation meets constitutional standards was emphasized in *Powell* v. *Ala.*, 287, U.S. 45, 57, 58 (1932).

See: *Palmer* v. *Ashe*, 342 U.S. 134, 137-38 (1951) *Hawk* v. *Olson* 326 U.S. 271, 274-78 (1945).

In this case counsel for petitioner neither prepared a case, nor talked the case over with petitioner, Instead he attempted to conduct a defense as the case presented itself in court from the prosecution stand point.

Trial counsel failed to protect basic rights of the petitioner or conduct a competent defense.

Whereas the writ of Habeas Corpus ad subjiciendum should issue in the interest of law and justice.

[fol. 17] CONCLUSION

Sufficient and probable cause being shown for this Honorable Court to believe that petitioner is confined and restrained illegally, whereas, petitioner request the issuance of the writ of Habeas Corpus.

Ad Subjiciendum directed to the respondent, commanding to produce the body of your petitioner before the bar of this honorable court and show cause, if any he can, why he restrains petitioner of and from his lawful liberty, and your petitioner shall ever pray.

I, Edward John Nowakowski, do hereby swear to the truth and correctness of all statements made herein as known to me, to the best of my knowledge and belief.

Respectfully Submitted

/s/ Edward John Nowakowski

Commonwealth of Pennsylvania
County of Allegheny

Sworn to and subscribed before me
this the 1 day of April, 1964.

WILLIAM SCHNUPP
Notary Public.

[fol. 18]

EXHIBIT AF TO PETITION FOR A WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 64-364

IN RE. APPLICATION OF EDWARD JOHN NOWAKOWSKI FOR HABEAS CORPUS

ORDER OF COURT

AND NOW, this 17th day of April, 1964, upon consideration of application for habeas corpus of the above named Edward John Nowakowski, a State prisoner, and it appearing that although applicant alleges that he has sought relief in the State courts, no copies of such proceedings have been attached to the application, now therefore

IT IS ORDERED that said application be and the same hereby is dismissed, for want of compliance with Rule 15 of the Rules of this Court, and for failure to show exhaustion of State remedies.

/s/ Dumbauld
United States District Judge

Copies to:

Edward J. Nowakowski (C 5560)
State Correctional Institution
P. O. Box 9901
Pittsburgh Pennsylvania 15233

Warden
State Correctional Institution
Pittsburgh, Pennsylvania 15233

Thomas P. Mangan, Esq.
1004 Palace Hardware Building
Erie, Pa.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

64-1087 Civ.

UNITED STATES OF AMERICA EX REL EDWARD JOHN NOWAKOWSKI, PETITIONER

vs

JAMES F. MARONEY, Supt. State Corr. Inst.

ORDER—October 19, 1964

AND NOW, this 19th day of October 1964, it appearing to the Court that the above named indigent defendant is without counsel to represent him in this proceeding, the Court hereby appoints Charles Stoops, Esq. 525 William Penn Place Pittsburgh, Penna 391-2345 to represent him.

/s/ Rabe F. Marsh
United States District Judge

[fol. 20]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[Title Omitted]

ORDER OF COURT—October 21, 1964

AND NOW, to-wit, this 21st day of October, 1964, the petition of Edward John Nowakowski for writ of habeas corpus having been filed, together with affidavit of forma pauperis, IT IS ORDERED that petitioner be and he hereby is permitted to proceed in forma pauperis.

IT IS FURTHER ORDERED that a rule be and the same hereby is issued to show cause why a writ of habeas corpus should not be granted and a hearing held as prayed for by the said relator.

IT IS FURTHER ORDERED that the District Attorney of Erie County, or his representative, shall file an answer to the allegations of the petition for writ of habeas corpus on or before November 5, 1964.

IT IS FURTHER ORDERED that the respondent make a return to said rule within three (3) days of the date of service thereof, pursuant to 28 U.S.C. 2243.

IT IS FURTHER ORDERED that the said District Attorney on behalf of respondent shall comply with Rule 16(g) of the Rules of this Court, and shall also file with this court the original or an exemplified copy of the transcript, if any, of any habeas corpus hearing held by the Court of Common Pleas of the County of Erie.

IT IS FURTHER ORDERED that the date for hearing on the rule to show cause be and the same hereby is fixed for Wednesday, the 18th day of November, 1964, at 2:00 P.M. No testimony will be taken at this hearing.
[fol. 21] Service of the rule, together with a copy of the petition, shall be made upon the Superintendent of the State Correctional Institution by the United States Marshal. Service of the rule, together with copy of the petition, shall be made upon the Attorney General of the Commonwealth of Pennsylvania and upon the District Attorney of the County of Erie by the United States Marshal by registered mail.

/s/ Rabe F. Marsh
United States District Judge

cc:

Edward John Nowakowski, C-7409
Box 9901
Pittsburgh 33, Pa.

Charles Stoops, Esq.
525 William Penn Place
Pittsburgh, Pa.

[fol. 21a]

[File Endorsement Omitted]

[fol. 22]

[RETURN ON SERVICE OF WRIT (Omitted in printing).]

[File Endorsement Omitted]

[fol. 23]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 64-1087

Habeas Corpus November Term, 1964

[Title Omitted].

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—
Filed November 3, 1964

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes James F. Maroney, Superintendent of the State Correctional Institution at Pittsburgh, respondent above named, and admits that Edward John Nowakowski is being confined and restrained of his liberty in the State Correctional Institution at Pittsburgh, but in answer hereto states as follows:

(1) On 16 September 1957, while under the supervision of the Pennsylvania Board of Parole, the said Edward John Nowakowski was sentenced by the Honorable Samuel J. Roberts in the Court of Oyer and Terminer of Erie County at no. 10 September Sessions 1957, to serve a term of 3 to 7 years for the crimes of Burglary, Larceny, and Receiving Stolen Goods.

(2) While confined in the Erie County Jail awaiting transfer to the Western Correctional Diagnostic and Classification Center the said Edward John Nowakowski escaped from the County Jail on 19 September 1957. He was returned from the escape and on 11 February 1958 he was sentenced by the Honorable Samuel J. Roberts in the Court of Quarter Sessions of Erie County at no. 74 February Sessions 1958 to serve a term of 4 to 10 years for Prison Breach.

(3) On 12 February 1958 by order of the Pennsylvania Board of Parole the said Edward John Nowakowski was received into the Western Diagnostic and Classification Center to begin serving backtime as a parole violator.

[fol. 24] The sentence imposed above in Erie County were entered on the records as detainers, consecutive with each other, and to follow his backtime for parole violations.

(4) Upon completion of his backtime for parole violations, the said Edward John Nowakowski was entered into the Western Diagnostic and Classification Center on 8 February 1960 to begin serving of the sentence of 3 to 7 years imposed on him in Erie County at no. 10 session September 1957 for Burglary, Larceny, and Receiving Stolen Goods. The records of the Western Diagnostic and Classification Center shows this sentence to be effective from 6 December 1959 and that the minimum term expired on 6 December 1962 and the maximum to expire on 6 December 1966.

(5) While serving the sentence of 3 to 7 years from Erie County the said Edward John Nowakowski was taken to Allegheny County and on 26 March 1963 he was sentenced by the Honorable James A. Reilly in the Court of Quarter Sessions at no. 334 November Sessions 1962 to serve 2½ years to 5 years for Assault by Prisoner.

(6) On 6 June 1964 by order of the Pennsylvania Board of Parole, the said Edward John Nowakowski was granted parole on his 3 to 7 year sentence and entered into the Western Diagnostic Classification Center to begin service of the sentence of 4 to 10 years imposed on him in Erie County at no. 74 February Sessions 1958 for Prison Breach. The records of the Western Diagnostic Classification Center show this sentence to be effective from 21 May 1964 and that the minimum term will expire on 21 May 1968 and the maximum on 21 May 1974.

(7) The sentence of 2½ to 5 years imposed on him in Allegheny County for Assault by Prisoner is recorded as a detainer and is to begin at the expiration of his present 4 to 10 year sentence.

(8) The said Edward John Nowakowski was trans-
[fol. 25] ferred from the Western Diagnostic Classification Center to the State Correctional Institution at Pittsburgh on 20 July 1964 where he is presently confined.

(9) Respondent has no knowledge of other allegations made by the petitioner.

SO ANSWERS:

/s/ James F. Maroney
JAMES F. MARONEY
Superintendent

[fol. 25a]

[File Endorsement Omitted]

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 64-1087

Habeas Corpus November Term, 1964

[Title Omitted]

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—
Filed November 5, 1964

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now, November 3, 1964, comes Edward H. Carney, District Attorney of Erie County, Pennsylvania, and files Answer to the allegations of the petition for Writ of Habeas Corpus in the above captioned case as follows:

(1) On September 16, 1957 the petitioner in this action, Edward John Nowakowski, was sentenced to serve a term of imprisonment for an indefinite term, the minimum of which shall be three (3) years, and the maximum, seven (7) years, to be computed from the date of commencement, to-wit: July 14, 1957, on a charge of Burglary, of which he was found guilty by a jury in the Court of Oyer and Terminer of Erie County, Pennsylvania at No. 10 September Sessions, 1957. Attached hereto, marked Exhibit "A" and made a part hereof, is a true and correct copy of the transcript of Alderman Michael J. Kinecki, Indictment and Sentence.

(2) On February 11, 1958 the petitioner, Edward John Nowakowski, was sentenced to a term of imprisonment, the minimum of which shall be four (4) years, and the maximum, ten (10) years, to run consecutively with all incompleted prior sentences in the Court of Quarter Sessions of Erie County, Pennsylvania, at No. 74 February Sessions, 1958 on a plea of guilty to an indictment for Prison Breach. A true and correct copy of the transcript of Alderman William F. Heisler, indictment and sentence of the Court, marked Exhibit "B" is attached hereto and made a part hereof.

(3) At No. 212 May Term, 1959, Court of Common Pleas, Erie County, Pennsylvania, the petitioner began a [fol. 27] long series of petitions for a Writ of Habeas Corpus, which petitions are substantially set forth in petitioner's petition now before you. Also set forth in petitioner's petition are the numerous Opinions handed down by the Court of Common Pleas of Erie County, Pennsylvania, as well as Opinions of the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. Perusal of these various petitions, briefs and Opinions, show that, at the most, five questions are involved, all of which, it is submitted, have no merit and give no reason for the Court to afford the petitioner the relief he seeks.

First, the petitioner appears to claim that he has been deprived of his constitutional rights under the United States Constitution and/or the Constitution of Pennsylvania. He claims that his counsel was incompetent at his trial. However, we of the Erie County Bar are well satisfied as to the competency and legal ability of Attorney Thomas C. Mangan, who was appointed counsel for trial. Under the law of Pennsylvania, it was not necessary that the Court provide the accused with counsel in a non-capital case, but nevertheless the Court did appoint Mr. Mangan and the record clearly shows that he performed his duties capably. To make such a complaint by petition for Writ of Habeas Corpus is, regardless, improper, since such questions should be raised by appeal.

Second, the petitioner attempts to review the sufficiency of evidence upon which his conviction at No. 10 September Term, 1957 was based, by Habeas Corpus, and to correct trial errors. This, of course, is an improper use of Habeas Corpus. Had the petitioner desired to take advantage of prior inconsistent statements, he should have done so at trial through his counsel.

Third, the petitioner questions whether or not there is sufficient evidence to allow a jury verdict to stand. Of course, as stated prior, Habeas Corpus is not available to review the sufficiency of evidence. The petitioner would have this Court believe that the only evidence offered against him on behalf of the Commonwealth, was that of an accomplice who, however, testified at his trial that he did not commit the offense of Burglary, with which

petitioner was charged, which evidence, no matter how [fol. 28] it is reviewed, is evidence favorable to the defendant's cause and not detrimental in any way. The fact that the witness was subsequently convicted of perjury for the reason that he testified under oath at the aldermanic hearing that the defendant did participate in the Burglary, has no bearing under the circumstances, even if it were reviewable at this stage by the method chosen by the petitioner.

Fourth, through his many petitions, petitioner questions the competency of his counsel. Since he was not entitled to counsel regardless, it seems superfluous to belabor the point. However, it is once again reiterated that the record shows nothing prejudicial to the defendant so far as his counsel and his counsel's conduct in conducting his defense are concerned. Had petitioner wished to have questioned the ability of Mr. Mangan to defend him, he had more than ample opportunity to do so at trial, which covered a period of two days. In addition, petitioner, prior to his trial and sentence, enjoyed a period of reflection covering several months after arrest wherein he might have obtained any counsel of his choosing and subponaed any number of witnesses he might have wished. Nothing shows us that this petitioner was indigent during that period of time.

Fifth, the petitioner further alleges that his rights were jeopardized and violated for the reason that one of the Commonwealth witnesses talked to one of the jurors during the trial at recess. Petitioner offers nothing to show that this juror was in any way influenced by the conversation other than an acknowledgment of acquaintance, does not claim his counsel refused to bring the matter to the Court's attention, does not claim that he attempted to bring the matter to the Court's attention, and in fact, does not even show the conversation to have been in any manner relevant to the business at hand. In such cases the petitioner must allege that such a juror was prejudiced, since there is a presumption in favor of the validity of the verdict. Again it is submitted that Habeas Corpus is no vehicle by which to bring this matter to the attention of the Court.

[fol. 29] The Answer of James F. Maroney, Superintendent, State Correctional Institution at Pittsburgh, sets forth the prison record of petitioner and is not repeated in this Answer for that reason.

It is denied that the petitioner has any legal basis whatsoever for the grant of a Writ in this case, either under the laws of the Constitution of the Commonwealth of Pennsylvania or of the United States.

WHEREFORE, it is requested that the prayer of this petitioner be denied and that a Writ of Habeas Corpus should not be granted.

/s/ Edward H. Carney
District Attorney

[*Duly sworn to by Edward H. Carney jurat omitted in printing (all in italics)*]

[fol. 29a]

[File Endorsement Omitted]

[fol. 30]

EXHIBIT "A" TO ANSWER OF EDWARD H. CARNEY

TRANSCRIPT—Commonwealth Case

COMMONWEALTH OF PENNSYLVANIA

versus

Joseph Corcoran, Age 16, 109 W. 18th St., Erie, Pa.
Douglas E. Smith, Age 28, 126 W. 4th St., &
Edward John Nowakowski Age 26, 506 E. 22nd St., Erie, Pa.

COSTS
OF JUSTICES
Michael J. Kinecki

Summary Offense	$	.....
Misdemeanor	$	.....
Felony	$	15.00

Fees Posted

OF OFFICERS

Const. J. P. Kolakowski

Executing Warrant	$	EPD
(3) Mileage	$	3.60
Subp. Witnesses	$	1.50
Mileage	$	.....
(3) Commitment	$	8.10
Release	$	2.70
Re-Comm.		2.70
		18.60

Nov 26 1957

WITNESSES

Each	$	.....
Mileage	$	.....
Each	$	.....
Mileage	$	.....
Each	$	.....
Mileage	$	.....
Total	$	33.60

Warrant issued July 13, 1957

MICHAEL J. KINECKI

To Erie Police Dept., Constable

Oath of Det. Sgt. C. A. Tribble, EPD
"Burglary."

Charging defendant with Corcoran & Smith, pleaded guilty, & Nowakowski pleaded Not Guilty. Smith & Nowakowski, with having on or about the 13th day of July, 1957, between the hours of 4:00 A.M., & 5:00 A.M. feloniously, wilfully and maliciously in the night time enter into a certain bldg. being a 1 story brick bldg. known as Greengarden Tavern, situated at 8th & Greengarden St., City of Erie, Co. of Erie, Pa., with intent to commit a felony therein, that is to say, with intent the goods, chattels, monies and property therein found to feltoniously take, steal, and carry away, said building being the property of one Howard, Hazlett, of 3615 Greengarden. Defs. gained entrance by breaking a door at the West of the Bldg.

Det. Sgt. C. A. Tribble, EPD

Charging def. Corcoran, with having on or about the 13th day of July, 1957, did plan, co-operate, assist, aid, counsel and abet, in the perpetration of a felony being Burglary. Def. drove a 1950 Oldsmobile Automobile, Reg. Plate #408967 for the year 1957, and was also on the look out while other principles were Burglarizing the Greengarden Tavern, situated at 8th & Greengarden St., Erie, Pa.

Det. Sgt. C. A. Tribble, EPD

Sworn and Subscribed before me this 13th day of July, 1957.

Michael J.Kinecki

Alderman and Ex-Officio Justice of the Peace.

Now July 13, 1957 all three defs. are arrested by the Erie Police Dept.

Now July 14, 1957 all three defs. are brought before me by Const. J. P. Kolakowski, and after hearing charges read to them, Corcoran & Smith plead guilty, and Nowakowski, pleaded not guilty, Corcoran & Smith were then

held for the 1957 Sept. Term of Court, and Comm. to the Erie Co. Jail in default of Court Bail, for their appearance at the 1957 Sept. Term of Court. Nowakowski was then held for a hearing on July 18, 1957 at 10:30 A.M., at Ald. M. J. Kinecki's office, and was then Comm. to the Erie Co. Jail in default of Court Bail, for his appearance at a hearing on July 18, 1957 at 10:30 A.M.

Now July 18, 1957 def. is released from the Erie Co. Jail for a hearing. A full hearing is held.

Sworn for the Comm. Douglas E. Smith testifies that he & the def. E. J. Nowakowski broke into the Greengarden Tavern. He also said that he met the def. in the Hasty Tasty place, in North Park Row, and in there talked about different things, and then made a date with the def. to pick him up at 3:00 A.M., at 5th & State St., on 7/13/57. Another def. J. Corcoran, and he then picked up Nowakowski and went to his home where the def. picked up some clothes, and also brought a tire iron. They then rode around, and went out to the Sebastian Tavern where they were going to try to break in, but got scared away by a barking dog. They then rode around, and went out to the Home Restaurant, on 8th & Peninsula Drive, and from there they were driven by Joe Corcoran, and went to the Greengarden Tavern at 8th & Greengarden. He & Nowakowski went then to the side door of the Tavern, and the def. then used a tire iron to force the door open. They then entered into the premises and the def. used the tire iron on four various machines., and broke them open. Def. then took out the cash boxes. Def. also went behind the bar, and took contents from there, also a small national Cash Register was carried out. I carried out the money boxes and as I ran out I fell over a tree stump, and dropped all the contents. Def. ran away in another direction. Police car came upon the scene, and that is why we fled.

Defense had no testimony to offer at this time. After listening to all the testimony, I hold the def. for the 1957 Sept. Term of Court. Def. was then Re-Comm. to the Erie Co. Jailin default of Court Bail, for his appearance at the 1957 Sept. Term of Court.

Other arresting officer, Det. Sgt. Simon Demchak, EPD.

Prosecuting Att'y. Asst. D.A. Richard Agresti.

[fol. 31]

IN THE COURT OF QUARTER SESSIONS
OF ERIE COUNTY

September Term, 1957, No. 10

COMMONWEALTH

versus

JOSEPH CORCORAN, 109 W. 18th St. Erie, Penna.,
DOUGLAS E. SMITH 126 W. 4th St., Erie, Pa., &
EDWARD JOHN NOWAKOWSKI, 506 E. 22nd St., Erie, Pa.

Before ALD. MICHAEL J. KINECKI
Charge: "Burglary".
Returned 7/19, 1957
D/N Corcoran 8/9

NOVEMBER 20th, 1957, DEFENDANT
DOUGLAS E. SMITH, SENTENCED.

/s/ George L. Wilson
Clerk of Courts.

Filed in Clerk of Court's Office Aug. 16, 1957
Erie Co. Pa.

[fol. 32]

IN THE COURT OF QUARTER SESSIONS OF THE PEACE FOR THE COUNTY OF ERIE

Sept. Sessions, 1957

COUNTY OF ERIE, ss.

THE GRAND INQUEST of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations do present That one Joseph Corcoran, one Douglas E. Smith and one Edward John Nowakowski late of said county, yeomen on or about the 13th day of July in the year of our Lord one thousand nine hundred and fifty-seven, at the county aforesaid and within the jurisdiction of this Court, with force and arms a certain tavern building at 8th and Greengarden in the City of Erie, County of Erie and State of Pennsylvania then and there situate, unlawfully, willfully, maliciously and feloniously did enter, with intent the goods and chattels, moneys and property of Howard Hazlett in the said Tavern Building then and there being, feloniously to steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And The GRAND INQUEST aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said Joseph Corcoran, Douglas E. Smith and Edward John Nowakowski late of said county, yeomen afterwards, to-wit: On the same day and year aforesaid, at the County aforesaid and within the Jurisdiction of this Court with force and arms, Undetermined amount of money from a pinball machine, pool table and 2 cigarette machines; 1 small National Cash Register to the value of $400; $60.00 cash from a cash register; $10.00 cash from a box; all to the total value of Four Hundred Seventy ($470.00) Dollars, lawful moneys of the United States of America, of the goods and chattels, moneys and property of Howard Hazlett then and there being found, then and there feloniously did steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peach and dignity of the Commonwealth of Pennsylvania.

[fol. 33] And the GRAND INQUEST aforesaid, upon their respective oaths and affirmations aforesaid, do further present, that the said Joseph Corcoran, Douglas E. Smith and Edward John Nowakowski afterwards, to-wit: On the same day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, with force and arms, the goods and chattels, moneys and property aforesaid, by some ill-disposed person, to the Grand Inquest aforesaid yet unknown, then lately before feloniously and burglariously stolen, taken and carried away, unlawfully, unjustly, and for the sake of wicked gain, did receive and have, the said Joseph Corcoran, Douglas E. Smith and Edward John Nowakowski then and there well knowing the goods and chattels, moneys and property last mentioned to have been feloniously and burglariously stolen, taken and carried away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Herbert J. Johnson Jr.
District Attorney.

[fol. 34]

No. 10 September Sessions, 1957

COMMONWEALTH OF PENNSYLVANIA

vs.

JOSEPH CORCORAN,
DOUGLAS E. SMITH,
EDWARD JOHN NOWAKOWSKI

INDICTMENT FOR

1st Count: BURGLARY.
2nd Count: LARCENY.
3rd Count: RECEIVING STOLEN GOODS.
Felony.

A True Bill

/s/ Harold H. Phanco
Foreman.

Aug. 28th 1957

And now, to wit: Sept. 10 A. D. 1957 the Defendant Douglas Smith being arraigned, plead guilty

/s/ Douglas E. Smith

C. A. TRIBBLE
Prosecutor.

WITNESSES:

/s/ C. A. TRIBBLE—EPD

/s/ SIMON DEMCHAK

/s/ HOWARD HAZLETT
%Greengarden Tavern
8th & Greengarden

Filed in Clerk of Court's Office Aug 16 1957
Erie Co. Pa.

Now, to-wit this 11th day of September, 1957 the Defendant Edward John Nowakowski being arraigned plead Not Guilty

/s/ Edward Nowakowski

[fol. 35]

Clerk of Courts—Form 21

IN THE COURT OF OYER AND TERMINER OF ERIE COUNTY, PENNSYLVANIA

Of September Sessions, 1957. No. 10

COMMONWEALTH

vs.

EDWARD JOHN NOWAKOWSKI

Indictment

1st Count: BURGLARY.
2nd Count: LARCENY.
3rd Count: RECEIVING STOLEN GOODS.

True Bill August 28th, 1957.

Defendant pleads Not *guilty* September 11th, 1957.

Tried by jury and verdict guilty September 12th, 1957.

And now, September 16th, 1957, the Court sentences the defendant Edward John Nowakowski to pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Three (3) Years, and the maximum Seven (7) Years, to be computed from the date of commitment, to-wit: July 14th, 1957, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Edward John Nowakowski, is ordered committed to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

/s/ Samuel J. Roberts
President Judge, Orphans' Court, Specially Presiding.

[fol. 36]

Clerk of Courts Form No. 7

COMMONWEALTH OF PENNSYLVANIA,)
) ss.
COUNTY OF ERIE)

I, George L. Wilson, Clerk of the Court of Quarter Sessions and Oyer and Terminer in and for the County of Erie, Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true copy of the Alderman's transcript; the indictment, together with all endorsements thereon; and sentence of the Court in the case of Commonwealth of Pennsylvania vs. Edward John Nowakowski as appears by the record in my office in said case, No. 10 September Sessions, 1957.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Erie, this Fourth day of November A. D. 1964

/s/ George L. Wilson
Clerk of Court of Quarter Sessions
and Oyer and Terminer

[SEAL]

[fol. 36a]

[File Endorsement Omitted]

[fol. 37]

EXHIBIT "B" TO ANSWER OF EDWARD H. CARNEY

TRANSCRIPT—Commonwealth Case

COMMONWEALTH OF PENNSYLVANIA

versus

EDWARD NOWAKOWSKI

COSTS

Misdemeanor	$ 11.00
Fees Posted	
Total	$ 11.00

Warrant issued December 11, 1957.

WILLIAM F. HEISLER

To County Detective, Constable

Oath of Roy Mong County Detective/

Charging defendant with Prison Breach.

That on or about the 19th day of September A. D. 1957, and at sundry other times at the City of Erie, County of Erie, and State of Pennsylvania, One Edward Nowakowski, after being tried and convicted on a Charge of Burglary but before he was sentenced escaped from the Erie County Prison, and he the said defendant did then and there violate Section 309 of the Act of 1939, P.L. and commit the Crime of Prison Breach. Contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Now, December 11, 1957, the Defendant cannot be found in the Bailiwick of William F. Heisler, Alderman, and a copy of the Transcript is sent to the District Attorney's Office.

each held in the sum of $..... conditioned that Defendant shall appear at next Court of Quarter Sessions of Erie County to answer above charge, and not depart said

Court until discharged by due course of law.....

each held in the sum of $..... to appear and testify in above stated case .....

ERIE COUNTY, ss: I hereby certify that the above is a correct Transcript of the proceedings held before me in above cause, and of record on my docket. In Testimony Whereof, I have set my hand and seal at Erie the 11th day of December, 1957.

/s/ Wm. F. Heisler (SEAL)
Alderman and ex-officio Justice of the Peace.
ALDERMAN, EX-OFFICIO J. P.
My Commission Expires January 1, 1958

[fol. 38]

IN THE COURT OF QUARTER SESSIONS
OF ERIE COUNTY

February Term, 1958, No. 74

COMMONWEALTH

versus

EDWARD NOWAKOWSKI

Before William F. Heisler

CHARGE:

Prison Breach. Section 309 of the Act of 1939 P.L. Returned 12-13-, 1957.

FEBRUARY 11, 1958, DEFT. SENTENCED

/s/ George L. Wilson
Clerk of Courts

Filed in Clerk of Court's Office Jan 15 1958
Erie Co. Pa.

[fol. 39]

IN THE COURT OF QUARTER SESSIONS OF THE PEACE FOR THE COUNTY OF ERIE

Feb. Sessions, 1958

COUNTY OF ERIE, ss.

The Grand Inquest of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Erie, upon their respective oaths and affirmations, do present,

That one Edward Nowakowski late of said County, yeoman on or about the 19th day of September in the year of our Lord one thousand nine hundred and fifty-seven, with force and arms, at the County aforesaid and within the jurisdiction of this court, while then and there undergoing imprisonment in the Erie County Prison in the City of Erie, County of Erie and State of Pennsylvania, did wilfully and unlawfully break prison and escape and he, the said Edward Nowakowski, did commit the crime of Prison Breach.

Contrary to the form of the Act of General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

/s/ Herbert J. Johnson Jr.
District Attorney

[fol. 40]

No. 74 Feb. Sessions, 1958

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD NOWAKOWSKI

INDICTMENT FOR
PRISON BREACH.
Felony.

A TRUE BILL

/s/ W. Jacques Schuler
Foreman
Jan. 27 1958

And now, to-wit: Feby 11 A. D., 1958, the Defendant being arraigned, pleads guilty

/s/ Edward Nowakowski
ROY MONG
Prosecutor.

WITNESSES

/s/ ROY MONG

/s/ JAY SHERMAN

Filed in Clerk of Court's Office Jan 15 1958
Erie Co. Pa.

[fol. 41]

Clerk of Courts—Form No. 21

IN THE COURT OF QUARTER SESSIONS OF ERIE COUNTY, PENNSYLVANIA

Of February Sessions, 1958. No. 74.

COMMONWEALTH

vs.

EDWARD NOWAKOWSKI

Indictment Prison Breach.

True Bill January 27th, 1958.

Defendant Pleads guilty February 11th, 1958.

And now, February 11th, 1958, the Court sentences the defendant Edward Nowakowski to pay the costs of prosecution and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Four (4) Years and the maximum Ten (10) Years, to run consecutively with all uncompleted prior sentences there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Edward Nowakowski, is ordered committed to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

/s/ Samuel J. Roberts
President Judge, Orphans' Court, Specially Presiding.

[fol. 42]

Clerk of Courts Form No. 7

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF ERIE)

I, George L. Wilson, Clerk of the Court of Quarter Sessions in and for the County of Erie, Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true copy of the Alderman's transcript; the indictment, together with all endorsements thereon, and sentence of the Court in the case of Commonwealth of Pennsylvania vs. Edward John Nowakowski as appears by the record in my office in said case, No. 74 February Sessions, 1958

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Erie, this Fourth day of November A. D. 1964

/s/ George L. Wilson
Clerk of Court of Quarter Sessions

[SEAL]

[fol. 42a]

[File Endorsement Omitted]

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[File Endorsement Omitted]

No. 64-1087

[Title Omitted]

MINUTE ENTRY OF ORDER ON RULE TO SHOW CAUSE WHY HEARING SHOULD NOT BE HELD—December 4, 1964

Hearing on Habeas Corpus

Before Judge Rabe F. Marsh

CHARLES STOOPS ESQ.
Appear for Plaintiff

Asst DA Erie County
WM. A. PEIFFER ESQ.
Appear for Defendant

Hearing begun 2:06 PM 12-4-64
Hearing concluded C.A.V. 2:30 PM

Stenographer HELEN E. SMITH
[ILLEGIBLE]

Commonwealth has 10 days to submit brief as to why hearing should not be held.

[fol. 43a]

[File Endorsement Omitted]

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[Title Omitted]

ORDER OF THE COURT—December 18, 1964

It appearing to the court that relator's petition demanding a writ of habeas corpus on the grounds, inter alia, (a) perjury, (b) ineffective aid and assistance of counsel, (c) "two Commonwealth [sic] were permitted to informally talk, with a Commonwealth witness", contains only conclusory allegations and does not contain clear or adequately informative statements of the facts relator proposes to show beyond that which already appears in the record of his trial;

NOW, THEREFORE, this 18 day of December, 1964, IT IS ORDERED that relator be and he hereby is required, within twenty days, to amend or supplement his petition to supply the aforementioned insufficiencies by specifying, under oath, the facts in detail upon which he relies in support of the grounds above set forth.

/s/ Rabe F. Marsh
United States District Judge

cc:

Edward John Nowakowski, C-7409
Box 9901
Pittsburgh 33, Pa.

Charles Stoops, Esq.
525 William Penn Place
Pittsburgh, Pa.

William A. Peiffer, Asst. District Attorney
Erie, Pennsylvania

[fol. 44a]

[File Endorsement Omitted]

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 64-1087

Habeas Corpus November Term, 1964

[Title Omitted]

AMENDMENT TO PETITION—Filed January 6, 1965

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Petitioner was unfairly denied effective aid and assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution at his trial that resulted in his incarceration in that:

(1) His court appointed counsel, Thomas C. Mangan, Esq., did not confer with the Petitioner until ten or fifteen minutes before his trial on September 11, 1957 before the Court of Oyer and Terminer of Erie County on a not guilty plea to charges of burglary and larceny, and immediately proceeded to try the case with no investigation of witnesses and facts prior to trial.

(2) The failure of the Petitioner's counsel to allow himself sufficient time to prepare for the case resulted in the absence at the Petitioner's trial of Mrs. Joan Logan Servido who would have by her testimony established the Petitioner's presence elsewhere at the time of trial.

(3) The failure of the Petitioner's counsel to interview Douglas Smith before the trial permitted the District Attorney to bring him before the jury and plead surprise at his testimony which would have apparently exculpated the Petitioner if presented on his behalf.

WHEREFORE Petitioner prays this Honorable Court grant the prayed for hearing:

Respectfully submitted,

/s/ Edward John Nowakowski
Petitioner
Box 9901
Pittsburgh, Pa. 15233

SWORN AND SUBSCRIBED TO BEFORE ME this
30 day of Dec., 1964.

[SEAL]

/s/ William C. Schnupp
Notary Public
William C. Schnupp, Notary Public
Pittsburgh, Allegheny County
My Commission Expires November 29, 1965

[fol. 45a]

* * * *

[File Endorsement Omitted]

[fol. 46]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 64-1087

[Title Omitted]

PETITION FOR SUBPOENA OF WITNESSES—Filed January 6, 1965

Petitioner respectfully requests this Honorable Court to order and direct that subpoenas be issued and served by officers of the Court on the following named persons to appear and testify on a date and hour set by the Court for a hearing in this case:

1. Jo Ann Logan
West 32nd Street
Erie, Pennsylvania

2. Thomas C. Mangan, Esq.
Erie, Pennsylvania

WHEREFORE Petitioner prays this Honorable Court to issue the necessary orders requiring attendance of the foregoing named witnesses at a hearing of this cause; in order that Petitioner have the opportunity to support his allegations of violations of his Federal Constitutional rights.

Respectfully submitted,

/s/ Charles C. Stoops, Jr.
CHARLES C. STOOPS, JR.
Attorney for Petitioner

[fol. 46a]

* * * *

[File Endorsement Omitted]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

UNITED STATES OF AMERICA, EX REL. EDWARD JOHN NOWAKOWSKI

vs.

JAMES F. MARONEY, Superintendent State Correctional Institution

MEMORANDUM OPINION—January 11, 1965

Marsh, District Judge.

Upon relator's application in forma pauperis for a writ of habeas corpus, a rule was issued to show cause why an evidentiary hearing should not be held, and counsel was appointed to represent him.

We are of the opinion that the rule should be made absolute.

It appears from the petition that the relator has filed five prior petitions for the writ in the Court of Common Pleas of Erie County, all of which were dismissed without a hearing.[1] A prior petition was filed in this federal court at No. 64-364, which was dismissed by an associate judge for failure to comply with Local Rule 15 and failure to show that state remedies had been exhausted.

In the state court petition at No. 376 May Term, 1960, we think the relator does, in effect, allege, as he does here, that his federal constitutional rights were violated in that he was deprived of the effective aid and assistance of competent counsel at the jury trial which resulted in a

[1] No. 212 May Term, 1959, No. 575 September Term, 1959, No. 376 May Term, 1960 No. 83 May Term, 1962, No. 420 September Term, 1963.

[fol. 48] verdict of guilty.[2] [3] See: *Thomas* v. *Cunningham*, 335 F. 2d 67 (4th Cir. 1964); *id.* 313 F. 2d 934 (4th Cir. 1963); *Whitley* v. *Cunningham*, 135 S.E. 2d 823 (Va. 1964) cited by relator's counsel. The state court dismissed the petition *without a hearing*, holding that the relator was properly represented by competent counsel. Relator appealed to the Superior Court of Pennsylvania[4] which affirmed. An appeal to the Supreme Court of Pennsylvania from a denial of a subsequent habeas corpus petition was denied; in that appeal relator raised this same issue.

Thus we find that relator has exhausted his state remedies on the issue of whether he was denied the effective assistance of counsel in violation of his federal constitutional rights.

It appears substantially from relator's amended petition that his counsel was appointed 10 or 15 minutes prior to the beginning of the trial; that he did not have time to adequately consult with relator, investigate the facts, interview the witnesses, and prepare for trial; that because of this, the trial was permitted to proceed in the absence of an important alibi witness, i.e., Mrs. Joan Logan Servido, and the District Attorney was permitted to call one Douglas Smith as a Commonwealth witness. Upon these facts, relator contends that the court should conclude that he was denied the effective aid and assistance of counsel to which he is entitled under the Federal Constitution.

[fol. 49] The transcript of the trial and other records supplied by the Commonwealth do not contravert the facts alleged in relator's amended petition. Therefore, despite the denials of the Commonwealth in its brief, we think the relator is entitled to prove the facts alleged at a hearing, if he can. *Herman* v. *Claudy*, 350 U.S. 116,

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[2] See Ex. H-30, attached to petition, items 2 and 4.

[3] Two other grounds were set forth in his petition now under consideration, i.e., (1) perjury, (2) a state witness conversed with members of the jury during a recess of the trial. Relator's counsel at the argument on the rule announced that these grounds would not be pressed.

[4] Commonwealth ex rel. Nowakowski v. Maroney, 194 Pa. Super. 24, 166 A. 2d 559 (1960).

118-119 (1956); *Commonwealth ex rel. Milewski* v. *Ashe*, 362 Pa. 48, 66 A. 2d 281 (1949); *Commonwealth ex rel. Butler* v. *Claudy*, 171 Pa. Super. Ct. 573, 91 A. 2d 318 (1952). Not having obtained such a hearing in the state court we feel required to grant him one in this court. *Cf. Townsend* v. *Sain*, 372 U.S. 293 (1963).

An appropriate order will be entered.

[fol. 50]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

ORDER OF COURT—January 11, 1965

AND NOW, to-wit, this 11th day of January, 1965, IT IS ORDERED that the rule to show cause why an evidentiary hearing should not be held be and the same hereby is made absolute, and a hearing on the petition of Edward John Nowakowski for a writ of habeas corpus be and the same hereby is fixed for Monday, the 8th day of February, 1965, at 10:00 A.M.

IT IS FURTHER ORDERED that a writ of habeas corpus issue directing James Maroney, Superintendent, State Correctional Institution, to deliver custody of said Edward John Nowakowski to the United States Marshal for the purpose of producing him before this court at the above mentioned hearing.

IT IS FURTHER ORDERED that notice of the hearing above mentioned be served upon the petitioner, upon Charles Stoops, Esq., 525 William Penn Place, Pittsburgh, counsel for petitioner, the District Attorney of Erie County, and the Attorney General of the Commonwealth of Pennsylvania by the United States Marshal; service of notice upon the aforesaid to be by registered mail.

Costs are to be borne by the United States.

/s/ Rabe F. Marsh
United States District Judge

[fol. 50a]

* * * *

[fol. 51] RETURN ON SERVICE OF WRIT

On the 13th day of January, 1965, I executed the within Order of Court by serving Edward John Nowakowski at the State Correctional Institution, Pittsburgh, Pa. certified receipt #743858 dated January 13, 1965, and return receipt dated January 14, 1965, are hereto attached.

And on the 13th day of January, 1965, by also serving the Attorney General of the Commonwealth of Pennsylvania, Harrisburg, Pennsylvania; certified receipt #743859 dated January 13, 1965, and return receipt dated January 15, 1965, are hereto attached.

And on the 13th day of January, 1965, by serving the District Attorney Erie County, Erie, Pennsylvania; certified receipt #743860 dated January 13, 1965, and return receipt dated January 14, 1965, are hereto attached.

And on the 13th day of January, 1965, by serving the attorney, Charles Stoops at 525 William Penn Place, Pittsburgh, Pennsylvania; certified receipt #743861 dated January 13, 1965, and return receipt dated January 14, 1965, are hereto attached.

/s/ James R. Berry
JAMES R. BERRY
United States Marshal

Marshal's Costs $12.00

[fol. 52]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 64-1087

Habeas Corpus November Term, 1964

[Title Omitted]

PETITION FOR ATTENDANCE OF WITNESSES—Filed January 20, 1965

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Petitioner respectfully requests this Honorable Court to order and direct that subpoenas be issued and served

by officers of the Court on Joan Logan of West 32nd Street, Erie, Pennsylvania and Thomas C. Mangan, Esq., of Erie, Pennsylvania.

Petitioner is without means and funds to pay the costs and fees of the aforementioned witnesses. However, a hearing on Petitioner's habeas corpus petition would not be full and complete without the testimony of said witnesses. Joan Logan is expected to testify about her contact with Petitioner on the night of the crime for which Petitioner presently stands convicted as well as the efforts of Petitioner's counsel to contact her for the purpose of giving her testimony at Petitioner's trial. Thomas C. Mangan, Esq., is expected to testify with respect to his pre-trial conversations with Petitioner, his preparation for Petitioner's trial and the manner in which he conducted the defense of Petitioner at Petitioner's trial.

WHEREFORE Petitioner prays this Honorable Court to issue the necessary orders requiring attendance of the foregoing named witnesses at a hearing of this cause at the cost of the Government in order to insure that Petitioner will have a full and ample opportunity to support his allegations of violation of his Federal Constitutional rights.

Respectfully submitted,

/s/ Edward John Nowakowski
EDWARD JOHN NOWAKOWSKI,
Petitioner

SWORN AND SUBSCRIBED TO BEFORE ME
this 18 day of January, 1965.

[SEAL]

/s/ William C. Schnupp
Notary Public
William C. Schnupp, Notary Public
Pittsburgh, Allegheny County
My Commission Expires November 29, 1965

[fol. 52a]

* * * *

[File Endorsement Omitted]

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[Title Omitted]

ORDER OF COURT—January 21, 1965

AND NOW, to-wit this 21st day of January, 1965, upon consideration of the petition of Edward John Nowakowski for attendance of certain witnesses, IT IS HEREBY ORDERED that the Clerk of this court issue subpoenas for the following persons:

Joan Logan
West 32nd Street
Erie, Pennsylvania

Thomas C. Mangan, Esq.
Erie, Pennsylvania

and that the United States Marshal serve said subpoenas, or cause them to be served, upon said persons in order to secure their attendance at a hearing to be held in the above entitled case on Monday, the 8th day of February, 1965, at 10:00 A.M., in Courtroom No. 1, 8th floor, United States Post Office and Courthouse, Pittsburgh, Pennsylvania.

Further, the relator having been permitted to proceed in forma pauperis, IT IS ORDERED that the witness fees and transportation costs of the above named witnesses shall be advanced by the United States.

/s/ Rabe F. Marsh
United States District Judge

cc:

Edward John Nowakowski, C-7409
Charles Stoops, Esq.
William A. Peiffer, Asst. District Attorney
United States Marshal

[fol. 53a]

[File Endorsement Omitted]

[fol. 54]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. C.A. 64-1087

U.S. EX REL EDWARD JOHN NOWAKOWSKI, PLAINTIFF

vs.

JAMES F. MARONEY, Supt. State Correctional Institution
DEFENDANT

MINUTE ENTRY OF HEARING ON PETITION FOR WRIT OF HABEAS CORPUS—February 8, 1965

Before Judge Rabe F. Marsh

CHARLES STOOPS, JR., Esq.
Appear for Plaintiff

WILLIAM A. PEIFFER, Esq.
Asst. D. A.—Erie County
Appear for Defendant

Hearing begun 10:00 A.M. EST. February 8, 1965
Hearing concluded C.A.V.
Hearing adjourned to
Stenographer HELEN SMITH
S.S. MAY

WITNESSES:

For Plaintiff

1—(2/8/65) THOMAS C. MANGAN
2—(2/8/65) EDWARD JOHN NOWAKOWSKI

[fol. 54a]

[File Endorsement Omitted]

[fol. 55]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

* * * *

ORDER OF COURT—February 8, 1965

AND NOW, to-wit, this 8th day of February, 1965, IT IS ORDERED that the petitioner, Edward John Nowakowski, be and he hereby is remanded to the custody of James F. Maroney, Superintendent of the State Correctional Institution, Pittsburgh, Pennsylvania, pending decision of this court in the above entitled matter; the United States Marshal is directed to deliver custody of the prisoner to the above named Superintendent; the writ of habeas corpus issued by this court on January 11, 1965, by virtue of which the above named prisoner was brought before this court for hearing, be and the same hereby is discharged.

/s/ Rabe F. Marsh
United States District Judge

[fol. 55a]

[File Endorsement Omitted]

[fol. 56]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Marshal's Civil Docket No. 14775

No. 64-1087

To JAMES F. MARONEY, Superintendent
State Correctional Institution, Pittsburgh, Pa. 15233

WRIT OF HABEAS CORPUS—January 12, 1965

YOU ARE HEREBY COMMANDED, to have the body of Edward John Nowakowski by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of his being taken and detained, before the Honorable Rabe F. Marsh, Judge of the United States District Court for the Western District of Pa., at the court room of said Court, in the City of Pittsburgh, Pa. at 10:00 o'clock a.m., on the 8th day of February, 1965, then and there to do, submit to and receive whatsoever the said Judge shall then and there determine in that behalf; and have you then and there this writ.

WITNESS the Honorable Rabe F. Marsh

United States District Judge at Pittsburgh, Pa. this 12th day of January, A. D. 1965,

JAMES H. WALLACE, JR.,
Clerk.

By /s/ Dolores J. Roosz
Deputy Clerk.

[SEAL]

[fol. 56a]

I hereby certify and return that I served the within Habeas Corpus on the within named James F. Maroney, Superintendent State Correctional Instution by handing to and leaving a true and attested copy thereof with Charles Wherle, Record Clerk of said instution at State Correctional Instution, Pittsburgh, Pa. on the 8th day of February, 1965 at 9:05 P.M.

Marshal's fee	3.00
Mileage	2.00
	$5.00

JAMES R. BERRY
United States Marshal WD-Pa.
By /s/ Charles C. Coolbuth
Deputy

[File Endorsement Omitted]

[fol. 57]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 64-1087

UNITED STATES OF AMERICA, EX REL. EDWARD JOHN NOWAKOWSKI, PLAINTIFF

vs.

JAMES F. MARONEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, DEFENDANT

TRANSCRIPT OF HEARING—February 8, 1965

PROCEEDINGS

in the above-entitled action February 8, 1965 at Pittsburgh, Pennsylvania, at hearing on petitioner's petition for a writ of habeas corpus, before the Honorable Rabe F. Marsh.

APPEARANCES:

On behalf of the Plaintiff:

Charles Stoops, Jr., Esq.

On behalf of the Defendant:

William A. Peiffer, Esq.
Asst. District Attorney
Erie County, Pennsylvania.

[fol. 58]

Monday, February 8, 1965
10:00 o'clock a.m.

THE COURT: This is the day fixed for hearing on the petition of Edward John Nowakowski for right of habeas corpus. Is Mr. Nowakowski present?

MR. PEIFFER: Yes, he is, your Honor.

THE COURT: Very well, proceed.

MR. STOOPS: I'd like to call as the first witness, Attorney Thomas Mangan.

THOMAS E. MANGAN,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STOOPS:

Q Mr. Mangan, what is your address?

A My home address, 3907 Davenport Avenue, Erie, Pennsylvania.

Q What is your profession?

A Attorney.

Q How long have you been practicing law?

A As I recall, I think I was admitted in December of 1955.

Q During the course of your professional practice did you have occasion to have association with the petitioner, Edward Nowakowski?

A I did.

[fol. 59] Q Will you please relate to the court the occasion upon which you came in contact with him?

Q Well as I recollect, sometime in the year of 1957, I think in the fall, I believe my books show September, I was called by the District Attorney's office, Erie County, and told that I had a court appointment, would I go over to contact Mr. Nowakowski in the jail, in the County Jail, and I talked to him at the jail, looked at the transcript I presume, I don't recall, my usual practice is to look over the transcript of the hearing in the district attorney's office, and discuss the case with the client, and I know I talked to Mr. Nowakowski. I had some notes on it, and we discussed the forthcoming trial. I don't recall exactly how many days ahead of the trial it was, but I know it was some days before the trial.

Q You did talk to Mr. Nowakowski before the trial?

A Yes, sir, I did, at the Erie County Jail.

Q Do you recall how long a period you talked with him?

A I don't recall.

Q Do you recall the charges against Mr. Nowakowski?

A My recollection was burglary. I don't—

Q Perjury?

A Burglary.

[fol. 60] Q Do you recall anything about the trial?

A Well, I recall that there were two other persons involved I think with Mr. Nowakowski. Both testified to the Commonwealth. I think, I think this is the case. I don't know, that one of the men tried to change his story on the stand, and his court-appointed attorney was called into the courtroom and there was some discussion about the matter, about the previous testimony of the other witness, and the testimony was continued.

Q Was not this man named Douglas Smith?

A I wouldn't recall, I have no idea.

Q Was not Douglas Smith, as you have related, a co-conspirator in this?

A As I understand, there were three of them involved, two men besides Mr. Nowakowski, yes.

Q Is it not correct the district attorney put him on the witness stand and he said that he was not guilty, and Mr. Nowakowski had not participated in any burglary or larceny with him. Do you recall that?

A That may have been. There was some discussion about it and I think, it is my recollection now Walter Dart was his attorney—may not have been; that is my recollection now. He had this testimony, already pled guilty I think, and Mr. Dart was called in to either the court room or chambers with the Judge to discuss [fol. 61] this matter. That is my recollection. I am not sure this is—

Q The trial in which you represented Nowakowski was interrupted for that purpose?

A Yes, because Smith, or whoever it was I don't know—whoever it was recanted on his previous testimony apparently. This is my recollection today. I don't—

Q The district attorney then brought him back into the Nowakowski trial and he continued to examine him?

A That is my recollection, yes.

Q In the course of that examination he pled surprise, is that correct?

A I don't recall. He must have, because there was some discussion about it.

Q Had you interviewed this witness prior to the trial?

A I don't recall whether I had or not, at this point.

Q Had you interviewed any of the police officers who investigated the case prior to trial?

A No, I hadn't, not that I recall. Normally they won't discuss it with you prior to trial.

Q Did you investigate who the prosecution witnesses were going to be, before trial?

[fol. 62] A I think I discussed it with the district attorney. I don't recall now.

Q Did you discuss the case with the victim of the alleged crime, before the trial?

A No, I did not.

MR. STOOPS: Your Honor, may I refer to the record of trial? It that part of the proceedings, officially?

THE COURT: Yes. You can make it part of the proceedings.

MR. STOOPS: I wonder whether I should go through the formality of introducing it in evidence?

THE COURT: I have a copy here. I don't know how I got it now; I think we will admit it in evidence. The trial transcript of the trial held on September 11, 1957 is admitted in evidence.

Q Referring to this record of trial it appears from Page 2 of the trial record, that a Mr. Howard E. Hazlett was the owner of the Green Garden Tavern which was burglarized on the night of July, or morning of July 13. Mr. Hazlett was put on the witness stand by the district attorney and testified to the effect that the police had notified him that his place had been burglarized, and asked him to come down and view it, which he did, and reported that the locks on the west side [fol. 63] of his tavern had been pried open and the cash register and various coin boxes were missing.

He then proceeded to testify that he received a letter from the defendant in the case, in which he offered to pay for the damages sustained at his tavern.

Do you recall any of this?

A No, I don't. I have no—the only recollection I have of the trial was there was some discussion about a cash register. As to the identity, as to what cash register it was, I think they called somebody from the National Cash Register Company, who came in to identify it as being the proper cash register. I have no recollection other than the fact I do recall in my notes that I have, there was something to do with the Green Garden Tavern. This is as much as I recall.

Q You have no recollection why you did not object to the admission of this letter or—

A I don't recall the incident at all.

THE COURT: Who wrote the letter?

MR. STOOPS: The defendant wrote it to the owner of the tavern which was burglarized.

THE COURT: You mean Nowakowski wrote it?

MR. STOOPS: Nowakowski wrote it, offering to pay for the damage.

THE COURT: And it was admitted in evidence?

[fol. 64] MR. STOOPS: Yes.

THE COURT: Why shouldn't it be? It's practically an admission of guilt, isn't it?

MR. STOOPS: This I don't know, whether it is termed a bribe, or maybe equated in the terms of an offer in a civil case. In the same letter he stated he was not guilty of it, but he wished to avoid going to trial, so forth.

THE COURT: He wanted to pay for the damages?

MR. STOOPS: Yes.

THE COURT: Just the damages?

MR. STOOPS: Yes, just the damages.

THE COURT: Do the damages include what was stolen?

MR. STOOPS: Was the letter introduced in evidence?

MR. PEIFFER: I am without a transcript this morning.

MR. STOOPS: I think there was merely a reference to the letter, so we do not have the full contents of it.

THE WITNESS: I have no present recollection—

MR. STOOPS: If this attorney has no recollection, there is no use proceeding in the matter further.

THE COURT: Of course we don't retry the case [fol. 65] on habeas corpus.

MR. STOOPS: No. I am just trying to see what aspects he can recall going into before trial.

Q Mr. Mangan, then going back to the testimony of Douglas Smith, alleged co-perpetrator of this burglary, his testimony commences on Page 9, and on Page 10 he invoked his right to refuse to answer on the ground it might incriminate him. Then there was a break in the trial, and this is the proceeding you are referring to?

Q As I recall there was this man on the stand; you said Douglas Smith; I don't recall who it was. He changed his testimony after apparently having pled guilty and been—I don't think he had been sentenced yet, because the normal procedure in Erie County, if they are going to be witnesses, to hold the sentence until after the trial of the one who hasn't, that is going to trial, and I think, my recollection is that Walter Dart, local attorney, had been court-appointed for this man, and that he came in the courtroom and there was some discussion about his previous testimony and his previous plea, and that is all I recall now.

MR. PEIFFER: If the court please, since this testimony is in evidence, I would request that Mr. Mangan be given an opportunity to refer to it, in as much as counsel is referring to certain pages of it.

[fol. 66] THE COURT: All right.

MR. PEIFFER: Page 9. (Handing document to witness.)

THE COURT: I still don't know what we have to do with this, what materiality the mention of the trial has to do with this habeas corpus action. As I see it, the relator alleged that his counsel was appointed ten or fifteen minutes before the beginning of the trial, he did not have time to adequately consult with the defendant, investigate the facts, interview witnesses, prepare for trial, and that because of this the trial was permitted to proceed in the absence of an important alibi witness, namely Joan Logan Servido, and the district

attorney was permitted to call one Douglas Smith as a Commonwealth witness. Those are the only facts on which the relator contends that I should conclude that he was denied the effective aid and assistance of counsel.

MR. STOOPS: Sir, I want to proceed to find out if Mr. Smith was interviewed before trial, whether his statement which became a key point in the trial was read by the attorney.

THE COURT: Go ahead.

Those are the issues as I see them.

Q Mr. Mangan, did you have an opportunity to read [fol. 67] Mr. Smith's pretrial statement?

A I don't recall at this time whether I did or not. I can't recall whether I interviewed him probably in the County Jail. I may have or may not have. I don't recall. I know I discussed the case with Mr. Nowakowski at least once, if not more than once. There was some discussion—the Judge mentions this Joan Logan—my recollection is that originally when we discussed it Mr. Nowakowski stated he had been with her all evening or all night, I don't recall; because she was the wife of someone else, he didn't want to particularly bring her into it. Shortly before trial I think we decided—he decided or I decided—she had to be there. My recollection was that he was in correspondence with her and had said she would voluntarily appear. Apparently this didn't come true, because I have in my book for Monday, September 9, to get a subpoena for Joan Logan, and I recall that—I am pretty sure this was the trial, or I went to try to serve the subpoena at the address Mr. Nowakowski give me, on the east side of—I think Seventh or Ninth Street. I went to this house at least once or twice, she wasn't there, and I was unable to locate her.

This morning I read Mr. Peiffer's brief and it says in there that there was a break in the trial and the [fol. 68] Sheriff attempted to find her. I don't recall this. I do know that I did try to get her there; whether I went out once or twice or more than that I don't know, to try to locate her.

Q There was another party involved in this crime, Joseph Corcoran, who was the driver, for the alleged

perpetrator of the crime. Do you recall interviewing him?

A I don't recall at this time whether I interviewed him or not.

Q Would your notes indicate it?

A My notes state Douglas Smith and Joe Corcoran, Joan Logan Servido. It says where Joan Logan worked, Parkview Restaurant, works three to seven. Another address, she lived at 334 and one-half East Twelfth Street. It states serve any time Monday afternoon. I presume this was after discussion with Mr. Nowakowski, because I wouldn't know where she could be located or when I could serve her.

Other than that, I have some, what is left of my trial notes I presume, that I found in my file in my drawer. It shows a—Howard Hazlett, Douglas Smith, Wilbur Jamison, Joseph Corcoran, and an Officer Tribble, Officer Demchak. I presume this was at the time of trial; I have no recollection of what went on at the time.

Q Do you recall telling the accused after his trial [fol. 69] that there were no reversible errors committed in the trial?

A I probably did. I don't recall that I did. I presume that—he called me over to the jail and I discussed it. I don't recall that I did or did not. I know I made no motion for a new trial.

THE COURT: You say you did not?

THE WITNESS: I did not. I don't recall whether I was requested by Mr. Nowakowski to, or not. I have no present recollection.

Q I refer you to the trial record, to the testimony of Wilbur C. Jamison.

A What page?

Q Page 23. In the first part of this—excuse me; that is the wrong party. Charles A. Tribble, Page 32.

In the first part of his testimony he relates to the circumstances surrounding apprehension of Nowakowski and then he proceeds to relate the written statement of the alleged co-perpetrator, Douglas Smith to the court and jury. I assume you would concur this was for the purpose of impeaching Smith, who evidently had recanted on his pretrial statement?

A I don't have any present recollection of it at all, of the situation.

Q Otherwise, it would appear to be hearsay evidence. [fol. 70] I wondered if you had any—

A I don't recall the evidence, I don't recall exactly what—

Q You have no recollection of it.

A I have no present recollection of Officer Tribble's testimony.

Q I refer you to the instructions of the court on Page 101, in which it points out that the testimony or cross examination of Douglas Smith was for the purpose of impeachment rather than substantive evidence. Does that ring any bell with you?

A No, none whatsoever.

Q And it does not state anything about the testimony of Officer Tribble?

A I have no present recollection of the Judge's instructions or charge at that time.

Q If the testimony of Officer Tribble was for impeachment purposes, was not it reversible error for the Judge not to instruct upon it?

A I have no recollection of the testimony. Also, I wouldn't know.

Q Do you recall examining the exhibits of the case before trial?

A I have no recollection of it, no. The only recollection I have now is that when the jury came in, that [fol. 71] Mr. Nowakowski asked that it be polled. He nudged me, said "Poll the jury." I did, and he turned to me and said—I recall this because he is the first and last criminal defendant that has ever said it—"Thank you, you did a nice job." That is the only recollection I have of the end of the trial.

Q I see. In your pretrial conference, or during the trial, did you ever advise the accused of his rights or the effect of the Pennsylvania Act of March 5, 1911 as to cross examination of a defendant on his prior criminal convictions?

A I have no recollection of it now.

Q I notice in Mr. Nowakowski's testimony, Page 73, or rather Page 74, top of Page 74, about the first thing

he states, that he was an ex-convict and on parole. Do you recall discussing the advisability of such testimony?

A I don't recall at this time. I have no recollection. I don't know whether we went into it or not. I see here he brought it out on his own, without a direct question from me.

Q Nor do you recall discussing the advisability of taking the stand?

A I think we must have discussed it in my conferences with him. His whole defense was alibi, and we had to—the only way we could prove he wasn't there [fol. 72] was by his own testimony, seeing we couldn't locate Mrs. Logan. There was no other defense he had. This is the only defense we had, that he wasn't there, his only alibi, the only way we could even get the alibi on record was to have Mr. Nowakowski testify.

Q Since you can't recall some of the details, whether you interviewed witnesses or not, I assume there is no further use delving into any more details?

A As I say, I have no present recollection of the situation other than what I have refreshed from my notes that I took at the time of the trial, and that is all I have. I have no recollection other than that.

MR. STOOPS: I have no further questions at this time.

CROSS EXAMINATION

BY MR. PEIFFER:

Q Mr. Mangan, on September 9 you say you have a note in your record book showing you were to get a subpoena for Joan Logan?

A Yes.

Q You are quite prepared this morning to testify you knew of the possibility of using Joan Logan as a witness for an alibi?

A Yes, I would.

Q Now did you, on that date of September 9 or [fol. 73] September 10, attempt to serve Joan Logan with a subpoena, to your recollection?

A I recollect that I drove out. I thought it was on the east side, I may be wrong; I see on my notes the

addresses are on the west side of town. The restaurant that he spoke of, Parkview Restaurant, I think was closed at this time, she was not working. This is my recollection now. I know that I drove some place in the City of Erie and attempted to get in contact with this witness, and I asked about her in several places.

Q You said previously I believe not once, or twice—at least once or twice you made that attempt to serve her?

A At least once; I think more than once. My recollection is that I tried to go out after her. Well, I went after work Monday, I don't recall, probably tried again the next morning. I don't remember.

Q You are well acquainted with all the streets in Erie?

A I would have no trouble finding it if I had the right address.

Q You are a life-long resident?

A For all intents and purposes.

Q Did you give any notice to Mr. Nowakowski prior to trial that you could not locate Joan Logan?

[fol. 74] A I have no recollection now. I presume we discussed it; I don't know.

Q Did Mr. Nowakowski at any time tell you that she would voluntarily appear?

A My recollection is that we had this discussion that she would be there, and then for some reason or other she wouldn't be either. Of course we decided I wasn't to get the subpoena, to force her to be there.

Q Did Nowakowski at any time tell you she was not going to be there, because he didn't want to drag her into the case?

A As I say, I have the recollection that we discussed the matter, whether he wanted her there or not. I think originally he said no, then that he decided yes, she should be there, she would come voluntarily, then there must have been something that she wasn't going to show up, because I got a subpoena, tried to serve her.

Q Mr. Mangan, if you will consult the record I think you will find it about half-way through, probably around Page 75 or 80, you will find where this case ended, or

recessed on a given day and started again the following morning. I call that to your attention and ask if it refreshes your memory as to what happened half-way through the trial. I am not sure of the page.

Do you recall what it is, Mr. Stoops?

[fol. 75] MR. STOOPS: Probably after the testimony of Demchak.

A You are talking about Page 93 where it says, "I have attempted to have this young lady Logan served." Is that what you are talking about?

Q Yes.

A I see on that page I stated that I talked to her on the phone, that she would be in town. That is what it says here. I don't have any recollection of talking to her on the phone at this time.

Q At the time of trial, you recall telling the court that she said she would be present?

A I recollect, I had some discussion with Mr. Nowakowski about it. I don't recall talking to her on the phone, no.

Q Would you continue looking at the next page?

A I see there was an adjournment, the court said, "we will make that process available . . ." I presume he means the sheriff.

Q Do you recall that the judge at that time said—well, words to this effect: "Since you haven't been able to locate her yourself, Mr. Mangan, we will make the sheriff's offices available to you for service between now and tomorrow morning at ten."

A I see that here. I have no recollection. I recall, [fol. 76] I think the sheriff did try to serve her. I have no present recollection of it.

Q Will you consult the record further and discover what happened the following morning when you returned to court?

A On Page 94 it says: "Your Honor, the sheriff's office is endeavoring to serve our witness and she is not to be found, so therefore the defense rests."

It says here, "Yesterday afternoon after court closed, about ten after four," I requested the sheriff to attempt service.

Q This was ten o'clock the following morning?
A Yes.
Q Sixteen hours later?
A I presume that would be about sixteen hours later.
Q Do you recall any conversation with Mr. Nowakowski at this point regarding this avaliability of this young lady?
A No, I have no present recollection. I presume in the course of the trial we did discuss it. I don't recall.
Q But you say further that after the case was finished, the jury came in with a verdict of guilty, you were given the unusual compliment from this defendant [fol. 77] that you had done a good job?
A He said, "Thank you, you did a nice job." Something to that effect. The only reason it stuck in my mind, is because it is the first and last one.
Q So far as you are concerned, Mr. Mangan, from your examination of that record are you satisfied in your own mind that you had time enough to prepare your defense for this defendant?
A Well, I presume that I was appointed at least some time before Monday, the ninth, because I had a note to get a subpoena on that Monday. I would presume it was some time the week preceding that, or I would have no exact idea of how soon. The general rule in Erie County is that you get a week to ten days before trial. I presume that was followed in this instance.
Q In so far as you are concerned, do you feel you did everything that you could have done as member of the Bar, to properly defend this man?
A I think so. I have no—as I say, I don't have too much recollection of the case. I did as well as I probably was able at the time, and I have no recollection that there was anything more I could have done.
Q Do you feel you made every effort to properly represent this man at his trial?
[fol. 78] A I think so, yes.
Q Have you felt any regret or any remorse about the way you handled the matter as an attorney?
A No, I have never had any second thoughts on it at all.

MR. PEIFFER: If the court please, I think the record speaks for itself in this particular instance. We are not here to examine the laws of evidence, particularly the Commonwealth of Pennsylvania, but I think the court is well aware of them, and its perusal of the record will show that the evidence was not poorly put in, timely objections failed to be made in any case, and we feel the record speaks for itself in this case.

MR. STOOPS: Sir, on the basis of that comment, may I make one.

I don't know; you say we are not here to retry the case, but there was not one objection in the whole trial record. The record is replete with hearsay evidence.

I just wanted to answer Mr. Peiffer.

THE COURT: What do you say is hearsay evidence? You say the record is replete with it.

MR. STOOPS: Well, there is testimony these two police officers went into detail about how the crime was committed. I assume the only legal basis for the ad-[fol. 79] mission if such evidence was to impeach the testimony of Douglas Smith.

THE COURT: Can't officers testify how a crime was committed after they investigate it? They do it every-day here.

MR. STOOPS: I am not referring to that. I am referring to their relation of what Douglas Smith told them happened, which is clearly hearsay unless it is being used to impeach statements made by Douglas Smith in court.

THE COURT: Isn't that all right?

MR. STOOPS: It is all right, but the instructions of the Judge did not point out, as required by the law of Pennsylvania, that such testimony was for impeachment purposes, not substantive evidence.

THE COURT: He didn't state that?

MR. STOOPS: No, he did not.

Furthermore, I cannot tell from examining Mr. Mangan, how surprised the district attorney was. I feel that this testimony of Douglas Smith in the manner it was presented to the court, was very damaging.

THE COURT: No doubt it was, but what could the defendant do about it?

MR. STOOPS: Well possibly—I don't know—talk to this witness before the trial might have revealed the [fol. 80] contents of his testimony. This is pure conjecture of course in retrying the case, but I don't know if Mr. Mangan talked to him or examined the statement.

THE COURT: He doesn't remember anything about the trial, apparently.

MR. STOOPS: That's right, sir.

MR. PEIFFER: If Mr. Mangan had examined the transcript, regardless he would have found this man Smith pled guilty in front of an alderman already, so Smith, in front of the court, Mangan certainly would have been ready to have expected him to say just what he did, and probably from all intents and purposes, I would suppose Mangan was just as surprised as the district attorney to find this man Smith suddenly say this man Nowakowski wasn't involved, when he had the transcript of the alderman in front of him saying Nowakowski was part of the plot. This man suddenly changes his story in the middle of trial. The records of Erie County, I don't believe, will show the man was convicted of perjury, Smith, for this very statement he made in this court trial.

THE COURT: Any redirect?

MR. STOOPS: No, sir. Excuse me; I have one question I'd like to ask.

[fol. 81] REDIRECT EXAMINATION

BY MR. STOOPS:

Q Were you satisfied with the trial continuing to its conclusion, without the testimony of this alleged alibi witness?

A Well, I presume at the time I thought it would help our case, because I attempted to find her. I don't know how we could have postponed the trial any further. The girl was unavailable. I couldn't find her, the sheriff's office couldn't find her. Apparently she didn't want to testify. Seeing she said she would, I see in the testimony I talked to her on the phone, she said she would be there, was not, I presume at the time that I presumed

she was then becoming unavailable because she didn't want to be available.

Q You made no effort to discuss this with the judge, or make a motion for a continuance?

A I think, I don't really think I requested it. I don't remember. I know, I see here now that the case was continued from Monday afternoon until the following morning on that basis. I don't have any direct recollection of specifically asking for a continuance till she was found. I doubt very much we'd have gotten it. I don't recall I asked for it.

Q The trial record states she was unavailable, the [fol. 82] defendant rests.

A That is as much as I know. I only know that because I read it this morning.

MR. PEIFFER: Mr. Stoops, the record shows of course the court gave him sixteen hours to produce this witness.

MR. STOOPS: This is sixteen hours from the conclusion of the trial, the preceding day, which was late in the afternoon.

MR. PEIFFER: Four o'clock until ten the next morning, eighteen hours.

THE COURT: I think I should ask counsel some questions.

BY THE COURT:

Q When did you say you were admitted to practice, Mr. Mangan?

A I think it was December '55, your Honor, my recollection.

Q This trial took place in September of '57?

A Yes, your Honor.

Q In the interval had you tried any criminal cases?

A I think I had. I don't recall.

Q You don't remember?

A I don't recall that I had. My recollection is, this [fol. 83] is not the first criminal case I tried.

Q You are not sure?

A I am sure it was not.

Q You are sure it was not. Can you estimate with any degree of certainty how many criminal trials you participated in prior to this trial?

A No, your Honor, I could not.

Q Did you try any civil cases prior to this trial?

A I don't recall that I did, your Honor. If I did it was subrogation and arbitration, rather than before a jury.

Q In other words, you did not try any civil cases before a jury prior to September 1957?

A I have no recollection of any, your Honor, no.

Q Have you tried any criminal cases since?

A Yes.

Q Do you have any estimate of how many?

A No, your Honor. I would say that I am usually appointed almost every criminal term, to some defendant, whether they plead guilty or go to trial. Almost every term I would think I have had several trials. I think I had one in September and one in December last year. I would say on an average of possibly maybe one or two actually go to trial a year.

[fol. 84] Q Have you ever been hired to defend a criminal case?

A Yes, I have.

Q Do you have any recollection of how many you were paid to try?

A My recollection of two, your Honor. That is going to trial, your Honor. I have been hired before an alderman or something of that sort, manage to get the thing taken care of at the preliminary hearing. On going to trial, I think I have a recollection of two particular cases I have been paid for.

Q Has the Erie Criminal Court ever appointed you on a murder case?

A No, they haven't, your Honor.

Q This defendant, this relator, says you were appointed ten or fifteen minutes prior to the beginning of this trial?

A Well, your Honor, I don't think that is possible. The trial as I see here was on the eleventh, and in my daybook I have a note which said, "Get subpoena for Joan Logan on Monday, September 9," so I must have known something about the trial prior to September 9, to write this down ahead of time. I dug this out of

[fol. 101] A I gave the information on the morning of the trial.

Q What time?

A It was in the morning. When, I don't recall; I am just going by the—

Q Before the trial started?

A Before the trial started.

Q How long before the trial started?

A Before, thirty minutes.

Q Thirty minutes before did you stay with Mr. Mangan, did he talk with you then continuously up to the time of the trial?

A I don't remember if he ever got up and left me.

Q He was with you, present with you; you are ready to state, are you not?

A Yes.

Q You were present and he was present when the jury was picked?

A The jury was already in the box.

Q Now Mr. Nowakowski, they were picking a jury when you were present, weren't they?

A No, sir.

Q Are you saying you weren't present when the jury was picked?

[fol. 102] A No, sir, I was not present when the jury was picked.

Q You stood trial in front of twelve people, and they found you guilty, is that correct?

A Yes, sir, that is correct.

Q Now, Douglas Smith got up and said that you weren't present with him when this Green Garden Tavern was robbed. You knew he was going to say that before the trial, didn't you?

A No, sir, I did not.

Q That was a surprise to you?

A Yes, it was.

Q It was a pleasant surprise, wasn't it?

A What do you mean, sir?

Q He was giving you an alibi?

A No, sir. I don't understand your question.

Q Didn't you tell Mr. Mangan Joan Logan wouldn't have to be present there because you had an alibi witness? Wasn't that the case?

A No, sir, I did not.

Q Isn't it a fact you knew, that you and Smith had agreed that he was going to make the statement in front of the court that day, and that is why you didn't want Joan Logan there?

A No, sir.

[fol. 103] Q Isn't it a fact that you knew Joan Logan was a married woman?

A Yes, sir, she is.

Q She had a husband who was not in town at the time; you are stating that you were with her that particular night. Is that true?

A Yes.

Q Isn't it a fact Joan Logan told you she didn't want to appear because she didn't want her husband to find out about you?

A I don't remember her saying that.

Q You don't remember that?

A No, sir.

Q Mr. Nowakowski, isn't it a fact you were very well aware of your rights; you had been in court before on burglary charges, hadn't you?

A Yes, I have.

Q You had an attorney before, hadn't you?

A 1955, I don't recall if I had an attorney. I pleaded guilty.

Q You knew that you had a right to have an attorney appointed if you wanted one, didn't you?

A Well, no, sir, I didn't know, I mean, it is not something I took for granted.

Q During the summer of this July and August of [fol. 104] 1947, Mr. Nowakowski, you state that for a period of time you had funds on hand, you could have hired an attorney then, could you not?

A Yes, sir, but I mean, it was needed in the home.

Q So you gave the money to your family, your sister and your mother, is that it and—

A My mother and my niece.

my file when Mr. Peiffer called me. This is my year book from 1957.

Q That is what you are holding in your hand?

[fol. 85] A Could I see it?

(Book handed to court.)

THE COURT: I have nothing further.

MR. PEIFFER: If the court please, I would like to offer in evidence this journal entry of Mr. Mangan's in the form of a photographic copy, if we might.

THE COURT: You mean the whole book?

MR. PEIFFER: Just the one-page entry. Would you like to examine that? We'd like permission to photograph it and offer its admission, please.

THE COURT: I notice there is an entry later on where he appeared for sentence.

MR. PEIFFER: Monday, September 16. Might we also make the same motion for that page, your Honor?

THE COURT: Any objection?

MR. STOOPS: No objection.

THE COURT: All right.

MR. PEIFFER: May we obtain a copy from the official copier in the building?

THE COURT: Yes, you can have it photographed here. It will have to be torn out.

MR. PEIFFER: That is all right by me.

MR. STOOPS: May I ask the witness another question?

THE COURT: Yes.

[fol. 86] BY MR. STOOPS:

Q Is it possible that the name of Joan Logan might have been referred to you by the district attorney's office?

A No, I don't think so. From my other notes, that I must have taken it from Mr. Nowakowski. I am sure it came from Mr. Nowakowski.

Q Do you recall whether Mr. Nowakowski had been arrested for larceny of a car which he had possession of?

A No, I don't recall that.

Q In connection with his apprehension in this case?

A I don't recall that.

Q If this were true, would it not be possible the district attorney's office had her name?

A It could be true. I wouldn't know; I have no way of knowing, or any recollection of it.

MR. STOOPS: I have no further questions.

THE COURT: Anything else?

MR. PEIFFER: No further questions, your Honor. I am questioning now if there are any other witnesses for the petitioner, any other subpoenaed?

MR. STOOPS: Yes. I have had the same difficulty as Mr. Mangan with obtaining Joan Logan. She has not appeared here, although we petitioned her at the same time we petitioned Mr. Mangan.

[fol. 87] THE COURT: Was she served?

MR. STOOPS: I do not know.

THE COURT: Where is the marshal?

THE WITNESS: Off the record, when I was served I had some discussion with the deputy marshal at Erie. He asked if I had any way of knowing where she was. He hadn't located her at the time he served me.

THE COURT: I don't have the marshal's return.

Marshal, is there a return on the service of Joan Logan Servido?

DEPUTY MARSHAL: Not to my knowledge, your Honor.

MR. STOOPS: We obtained her address from the telephone book; I believe it was West Thirty-second Street, Erie, Pennsylvania. That is the only record I was able to obtain on her.

THE COURT: We will call the marshal and see what happened. I don't have any return here, but they no doubt have a return.

MR. STOOPS: In the meantime, if you wish, I would like to put the relator on the witness stand.

THE COURT: Very well.

[fol. 88]

EDWARD JOHN NOWAKOWSKI,

called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STOOPS:

Q Would you please state your full name?
A Edward John Nowakowski.
Q Are you the relator in this case?
A Yes, sir.
Q Have you ever had occasion to enter into a relationship or procure the legal services of Attorney Thomas Mangan?
A Yes, sir.
Q Would you please relate to the court the circumstances under which this occurred?
A He was appointed to me September 11, 1957.
Q Do you know as a fact he was appointed September 11?
A No. Well no, sir, I don't know as a fact.
Q You do not have a court order appointing him?
A No, sir.
THE COURT: How do you know?
THE WITNESS: This is when I first met him, sir.
Q The record of your trial indicates the trial commenced approximately eleven-fifteen a.m. on September [fol. 89] 11, 1957. When did you first meet Mr. Mangan?
A Prior to the trial.
Q That same day?
A The same day.
Q How long a period elapsed between the time when you first met Mr. Mangan and the trial commenced?
A Before, thirty minutes.
Q It could not exceed thirty minutes?
A No, it couldn't.
Q Prior to that date, you had never seen Mr. Mangan?
A No, sir, I cannot recall.

Q Did you ever meet him in the Erie County Jail?

A No, sir.

Q You were incarcerated in the Erie County Jail prior to trial?

A I was there July 13 until September 18.

Q During that period, did you consult with any attorney?

A No, sir, I had been interrogated by detectives and someone from the district attorney's office, but that was all.

Q Did you have any visitors during that time?

A Yes, sir, I did.

Q Who were they?

[fol. 90] A Joan Logan came to visit me, two detectives came over to visit me, and members of my family and someone from the district attorney's office, I don't know who, came over to visit me, and I was called downstairs to the office, and I was asked questions for about two or three minutes, and I was—that would be all. I was told that would be all, they told me they were detectives.

Q During this period, was there discussion about retaining counsel during your trial?

A Yes, I discussed it.

Q Why did you not retain counsel?

A I had no funds.

Q During this period, did the name Joan Logan arise in any discussion between you and representatives of the district attorney's office?

A Yes, I mentioned it. I mentioned her name in the alderman's office, and I also mentioned it to the district attorney when I was being arraigned. This was on August 18—August 28 I believe.

Q I note in the record of trial the judge refers to three charges, and instructs the jury to disregard one charge, namely receiving stolen goods. Whatever happened to that charge; were you ever arraigned on it?

A No, sir, I was not.

[fol. 91] Q In the period that elapsed between your first meeting Mr. Mangan, as you say on September 11, and the time the trial commenced, was there any discussion between you and Mr. Mangan?

A Yes, there was. I told him about my witness and he took the information, and that was all the discussion about Joan Logan.

Q Did you discuss the tactics that might be employed in your defense at this trial?

A I don't remember too much of that. I told him that, about my alibi, where I was.

Q Was there any discussion about the advisability of you pleading not guilty in this case?

A No, sir, I don't remember anything of that.

Q Was there any discussion with respect to the prosecution witnesses, what they might be expected to testify to?

A No, sir.

Q Was there any discussion about Douglas Smith?

A No, sir, there was no discussion.

Q His statement?

A No, sir.

Q Prior to your taking the witness stand in your own defense, was there any discussion about the advisability for you taking the witness stand, and your rights [fol. 92] in connection therewith?

A No, sir, there was no discussion of that.

Q What did Mr. Mangan say to you in connection with your alibi witness Joan Logan?

A He said he talked to her on the telephone, she was going to come down and testify for me.

Q What time did he state this?

A This was in the morning, on the eleventh.

Q Was this prior to your trial?

A This was during the trial, during one of the recesses.

Q Thereafter, was there any further discussion of her, about Joan Logan?

A Yes, there was discussion in the afternoon about her.

Q Would you please relate to the court the nature of that discussion?

A Well, I give the information about the witness, he told me that he talked—this was maybe about ten, ten-thirty, a quarter to eleven, that he talked to the witness on the telephone, she was coming down to testify

for me, and then at the trial he told, not me, told the court, "I inquired, that she is out of town."

Q Did you say ten-thirty or eleven?

A This was in the morning.

[fol. 93] Q The trial did not start until eleven-fifteen, according to the transcript.

A Whenever the trial started. I don't know. It happened at the first or second recess of that first day.

Q Did you testify during the first day of the trial?

A Yes, sir, I believe I did. I believe I testified in the afternoon.

Q After you finished your testimony did Mr. Mangan say anything to you about your witness?

A No, sir.

Q The next morning, when your trial commenced again, did he say anything about your witness?

A No, sir.

Q Prior to his relating to the court as it appears in the record here, that the witness was not to be found by the sheriff's office, nothing was said to you?

A No, sir, nothing was said to me.

Q Upon conclusion of your trial, did you tell Mr. Mangan that he had done a good job for you?

A No, sir, I did not.

Q Did you ask him to appeal your case?

A Yes, sir, I did.

Q What did he tell you?

[fol. 94] A He told me that Douglas Smith's statement would be held against me.

Q Do you know what he meant by Douglas Smith's statement? It appears from the record of trial that Douglas Smith's statement was in your favor.

A I have no idea.

Q Was it Douglas Smith's statement that was related by the officers?

A Yes, sir.

Q Did you tell Mr. Mangan about taking a taxi cab from Joan Logan's house?

A Yes, sir, I did.

Q What did he say about that?

A He said it would do no good.

MR. STOOPS: I have no further questions at this time. Your witness.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. PEIFFER:

Q Mr. Nowakowski, what education did you have; how far did you go in school?

A Well, I just brushed through the eighth. I entered the ninth, but I failed.

Q You say that you talked over some things with Mr. Mangan here regarding Joan Logan. What else did [fol. 95] you talk over with him during the trial?

A Well, at one point I did mention to him that I was implicated by Douglas Smith and Joseph Corcoran.

Q You told him that Douglas Smith had implicated you already on this robbery didn't you, told Mr. Mangan that?

A Yes, sir. There was no discussion concerning Douglas Smith, and he asked me about Douglas Smith.

Q Was Douglas Smith in the County Jail with you during July and August of 1957?

A I have no idea where he was.

Q But you recall at the alderman's hearing Douglas Smith said you were part of this job, didn't he?

A Yes, sir, he did.

Q When Douglas Smith came to the trial, Mr. Mangan was defending you, Douglas Smith said you were not, didn't he?

A He said he was innocent.

Q He said you were innocent.

A He said he was innocent, then he said I was innocent.

Q He said you weren't there?

A He said, Douglas Smith said he was innocent, then he said I was innocent.

Q But you were present when Douglas Smith said [fol. 96] that you did it, at the alderman's hearing, weren't you?

A Yes, sir, I was present.

Q And you heard Corcoran also plead guilty there, did you not?

A No, sir, I don't remember that.

Q Do you remember Smith pleading guilty?

A No, sir, I don't. That was my hearing.

Q July 14, 1957, is it not a fact that you, all three of you were taken before Alderman Kinecki, in Erie?

A I was taken before Alderman Kinecki.

Q All three of you were, weren't you?

A I know I was, sir.

Q Now Mr. Nowakowski, I call your attention to the record of Alderman Kinecki in this matter, which is part of the record, a copy of this wherein he states, "Now July 14, 1957, all three defendants are brought before me by Constable J. P. Kolakowski." That is Mr. Kinecki. Do you recall being together with these other two men at the time?

A Well, I was taken in an automobile by myself. I don't recall being with anyone else, whether Douglas Smith and Corcoran would be there. That is something that I do not know about them. I can only say—

Q You prefer to state now you didn't hear Mr. Doug- [fol. 97] las Smith make some statements in front of Alderman Kinecki about what happened?

A Yes, sir, I did.

Q You did hear the statements?

A Yes, sir.

Q Did you hear Smith testify that he and Nowakowski broke into the Green Garden Tavern?

A I heard Smith testify to something of that effect.

Q Did you testify at that hearing?

A I don't remember what I said. When I went in the hearing, I asked to—if I could use the telephone. I wanted to call Joan Logan. This I was refused by Mr. Kinecki. Then I said I would like to call an attorney, and at that time I did have funds capable of hiring an attorney. I had a check at the company I worked, and I had some fifty dollars at home.

Q I believe the record shows you were working at the time, drawing a weekly salary, weren't you, Mr. Nowakowski?

A Yes, I was working, and this was refused.

Q Then at that time you knew you had the right to an attorney, didn't you?

A Well no, I was refused an attorney.

Q You asked for one, didn't you?

[fol. 98] A Yes, I did.

Q Regardless of whether you were refused or not, you knew you had the right to an attorney?

A No, sir. I was merely requesting that I had money to hire an attorney.

Q Subsequent to this, you were in the County Jail, where you stayed for two months prior to trial, did you not, Mr. Nowakowski?

A Well, after the hearing was over, I was taken back to the County Jail, yes.

Q And you sat in there for two months, and you say that your family visited you, Joan Logan visited, and two detectives visited you. During that period, did you make any effort whatsoever to obtain an attorney?

A First of all, sir, the money that I had was given to my home.

THE COURT: What is that?

THE WITNESS: It was given to my home, it was needed.

Q Given to who in your home?

A My mother and my niece. Then it was discussed later on we would try to obtain the money to obtain counsel for me. The next time our discussion about counsel came up at my arraignment.

Q At your arraignment. These discussions of coun-

[fol. 99] sel at arraignment, that was July 14, Mr. Nowakowski?

A Mr. Johnson I believe, or whoever was there, asked me if I had an attorney. I told him no, I didn't.

Q What date was that?

A I believe it was August 28.

Q That was your arraignment?

A I don't know what it was. I mean it was something or other.

Q Where did this take place?

A In the courthouse.

Q What date was that?

A I believe it was August 28 when I was taken up to the courthouse, taken over to the district attorney's office.

Q And at that time Mr. Johnson you say—I gather he was the district attorney—asked you if you had an attorney, is that right?

A That is right.

Q You said no?

A I said no.

Q He asked you if you wanted one, and what did you say?

A No, sir, he didn't ask me. He asked me if I had one. I told him no.

Q Did he tell you one would be appointed?

[fol. 100] A No, sir. There was no discussion on that.

Q Did you ask?

A No, sir.

Q Subsequently you came in contact with Mr. Mangan, is that right?

A On the date of the trial, yes, sir.

Q Mr. Mangan states that he knows of at least two or three days ahead of time that he was appointed. Are you stating that that is not correct?

A I am not stating it is not correct. I don't recall; I am not stating it is not correct.

Q Don't you recall on Monday, September 9, that Mr. Mangan came over and talked to you in the County Jail?

A No, sir, I do not.

Q Are you going to deny that he did?

A Yes, sir, I am, because I do not recall.

Q You don't recall, so you deny it. Mr. Mangan here testified that he had a note in his daybook on September 9, to get a subpoena for Joan Logan?

A That information did not come from me, sir.

Q Mr. Mangan states that it did; are you saying that Mr. Mangan is not telling the truth here?

A I am not saying the truth; that information did not come from me.

Q Mr. Mangan said it did.

Q During that two months you sat in the County Jail, you had an ample opportunity to obtain an attorney, didn't you?

A Well no sir, I didn't take it for granted I was to receive an attorney.

Q You had your family; did you ever talk that over with them?

A Yes, sir, there was discussion.

Q And nobody restrained your speech or phone calls particularly; you had plenty of opportunity to get a message out to your attorney?

A I couldn't make a phone call.

Q You could talk to your family and tell them to get an attorney for you?

A Yes, I could have.

Q You never spoke to them about an attorney, did you?

[fol. 105] A Yes, I did discuss something about an attorney while I am to stand trial.

Q Did you tell them to find out whether or not you were entitled to an attorney at any time?

A No, sir.

THE COURT: Excuse me. I have the marshal in Erie on the phone; I want to talk to him.

Did he ever report to you?

MR. STOOPS: No, sir.

THE COURT: Did anybody report to you?

MR. STOOPS: No, sir.

THE COURT: Relative to the subpoena?

MR. STOOPS: Not to my knowledge.

THE COURT: Did you make inquiries?

MR. STOOPS: No, sir.

THE COURT: Take a recess for five or ten mintues.

(Recess taken.)

THE COURT: Mr. Milanovich, Deputy Marshal, I have here an original and a copy of the subpoena to Joan Logan in this case of Edward John Nowakowski against James F. Maroney, Superintendent—

DEPUTY MARSHAL MILANOVICH: Your Honor —

THE COURT: Wait a minute—ordering her to appear here today at ten o'clock. The subpoena bears the [fol. 106] date January 22, 1965. It has no return. I called Mr. Johnson, having been advised that he was the marshal, who was supposed to serve it, and he told me he didn't make any return, and I told him to get down here promptly and make a return.

This subpoena was issued at my order. No one told me, from January 22, 1965 to February 8, 1965, that she couldn't be located. In fact, no one could tell me now, because there is no return made by Marshal Johnson, which is supposed to be sworn to.

Aren't they instructed to make returns on these subpoenaes?

DEPUTY MARSHAL MILANOVICH: Your Honor, when a subpoena is served, the return is made. On that particular subpoena, the woman that he was trying to subpoena had moved to Florida, and therefore there was no return made.

THE COURT: You'd return it, "Unable to serve it, moved to Florida."

DEPUTY MARSHAL MILANOVICH: Well, from what I gather from our girls in our office, they didn't know that subpoena came from your office.

THE COURT: Somebody got an order to issue it; who would get that?

DEPUTY MARSHAL MILANOVICH: It would [fol. 107] probably be in the Clerk's office. We didn't get it.

THE COURT: You wouldn't get the order?

DEPUTY MARSHAL MILANOVICH: No.

THE COURT: You mean the Clerk issues the subpoena?

DEPUTY MARSHAL MILANOVICH: That's right.

THE COURT: Well then, you'd get the subpoena, "No return, the woman can't be found."

DEPUTY MARSHAL MILANOVICH: On some of those subpoenaes, we don't make a return unless we are ordered to make it, "Unexecuted" or "Returned," or in

lots of cases where we find that the witness has moved we forward the subpoena to that district to be served. In this case it would be Florida, we—

THE COURT: In this case it wasn't forwarded?

DEPUTY MARSHAL MILANOVICH: We didn't know where to forward it. We thought it was issued on behalf of the plaintiff's attorney.

THE COURT: You made no inquiry?

DEPUTY MARSHAL MILANOVICH: I didn't. I will have to answer that.

THE COURT: Mr. Johnson says he gave two addresses in Florida; one, 28 North Drive, Lakewood, Florida; the other one, 2767 South Military Trail. 28 North Drive, Lakewood, Florida, I guess just one address. I [fol. 108] thought he told me two addresses in Florida, but it wasn't forwarded.

I told him to get down here and make his return. If they are not supposed to make a return on unserved subpoenas, why? Maybe you better countermand it, but it seems to me I should have been informed sometime that the service could not be executed. It seems to be the proper way is on the return.

DEPUTY MARSHAL MILANOVICH: I agree with what you say, your Honor, but you know, I wasn't handling it.

THE COURT: I know that. Mr. Johnson handled it; I know you are the only one over there.

DEPUTY MARSHAL MILANOVICH: That's right.

THE COURT: Every other order I have ever made, on the back of it has a return of service of the writ signed by the marshal, but this one, nothing. It is dated the eleventh of January 1965, and I haven't heard one word about it since.

DEPUTY MARSHAL MILANOVICH: It is our office's fault, your Honor, that you didn't. I of course didn't know anything about it.

THE COURT: All right, thank you for coming over.

DEPUTY MARSHAL MILANOVICH: Yes, sir.

THE COURT: Gentlemen, apparently they can't locate her anywhere. We will get a return sooner or later,

[fol. 109] but it will possibly be that way. I don't know whether the government will be able to bring her up from Florida anyway.

Proceed with cross examination.

EDWARD JOHN NOWAKOWSKI,

resumed the stand and testified further as follows:

CROSS EXAMINATION (Cont'd.)

BY MR. PEIFFER:

Q How old were you, Mr. Nowakowski, when this trial took place?

A Twenty-seven I believe.

Q What was your occupation?

A I was a laborer, sand blaster.

Q Where did you work?

A The Erie Enameling Company.

Q You have stated that Mr. Morgan told you about a phone call to Joan Logan; when did he tell you about that?

A During the day of the trial.

Q What time?

A I don't recall, sir.

Q Morning or the afternoon?

A Well, it could have been before lunch, it could have been after lunch.

Q Was it the the first day or the second day of the [fol. 110] trial?

A The first day.

Q Can't you recall with any more certainty than that, Mr. Nowakowski? Was it before lunch, or after lunch?

A Are you asking me to guess, sir?

Q No, I am asking you to try and remember better. You don't want to state?

A I can't.

Q If it were in the morning, Mr. Nowakowski, what time did your trial start that morning?

A I thought maybe it started around nine o'clock or so. I don't know what time it started, I didn't look at a clock or anything.

Q According to what I heard here prior, your trial started at eleven-fifteen a.m.

A Well, then that is when the trial started.

Q Further, that you met Mr. Mangan, the first time you had ever seen Mr. Mangan it was at ten forty-five or thereabouts, a half an hour prior to the start of the trial.

A The start of the trial.

Q Now, if Mr. Mangan told you he called Joan Logan before lunch, when did he call her?

A It was during one of the recesses. It might have [fol. 111] been when they took Douglas Smith out to another courtroom I believe, after that, that he said he spoke to Joan Logan.

Q Did you know of your personal knowledge Joan Logan was in the City of Erie during your trial?

A Well yes, she visited me at the County Jail.

Q You were present in court when the judge told Mr. Mangan he might have the services of the Erie County Sheriff to serve this subpoena, were you not?

A I don't know. I read it in the transcript.

Q Do you believe, after reading the transcript, that refreshes your recollection that was the case?

A No, sir, I don't.

Q Are you prepared to say this transcript is incorrect?

A I have not said that.

Q Then you say no, your answer is no?

A I am getting lost on your question.

Q Well, in the transcript that we have here, the court made a statement to Mr. Mangan that he, the court, would give him till the following morning to obtain the service of Joan Logan with subpoena. Were you present, and did you hear that?

A Yes, sir, I believe I was.

Q Then you knew at the time Joan Logan was in town?

[fol. 112] A Yes, Joan Logan was in town.

Q You heard Mr. Mangan state that he did give this subpoena, or this subpoena was supplied to the sheriff's office.

A Well, sir, she was in town, sir, because he spoke to her on the telephone. He said—

Q Were you present the following morning when Mr. Mangan came back into court? I presume you were there—at ten o'clock on September 12?

A I was there, oh, yes.

Q Did you hear Mr. Mangan tell the court at that time that Joan Logan was unavailable, could not be located by the sheriff of Erie County?

A Something of that.

Q Did you and Mr. Mangan have a discussion about her unavailability at the time?

A No, sir.

Q You state you know she was in town at that time?

A Yes, sir, she was.

Q Can you give any reason why the sheriff of Erie County was unable to serve Joan Logan with a subpoena?

A I don't even know if the subpoena was issued.

Q You heard the conversation in court about a subpoena surely?

A Well, I heard some discussion concerning Joan but [fol. 113] I—I don't know what it was all about.

Q Well, the following morning when you and Mr. Mangan appeared before the court, did you ask Mr. Mangan to try and have the case delayed until Joan could be found?

A No, sir, I didn't know anything about that.

Q But you heard him tell the court she could not be found, did you not?

A Yes, sir. What am I to do?

Q You knew she was in Erie?

A Yes, sir, she was in Erie.

Q Had Douglas Smith testified by this time?

A He testified, yes, sir, he did.

Q He testified the prior day, or did he testify that morning?

A He testified on the eleventh.

Q Is that the first or—

A The first day.

Q When the case was all concluded, and the jury came in and found you guilty, did you have any conversation with Mr. Mangan?

A Yes, sir, I did.
Q What did you tell him?
A I asked him to poll the jury.
Q Did he do that for you?
[fol. 114] A Well, reluctantly.
Q He did it for you?
A Yes, sir, but—
Q You know about polling a jury?
A I learned that in the County Jail from a jail house lawyer.
Q Mr. Nowakowski, while you were in the County Jail, isn't it a fact from the jail house lawyer you also learned you had the right to an attorney?
A No, sir, I did not take that for granted. I did not know that.
Q The jail house attorney did tell you to poll the jury?
A No, he did not tell me that. I was listning to the discussions.
Q Mr. Mangan testified that after the jury came in, and after his services were completed, you told him "Thanks, you did a good job."
A No, sir.
Q Are you stating that is not so?
A That is not so.
Q You did not say that?
A I did not say that. I said, "I want you to appeal my case."
Q You stated you wanted to appeal this case?
[fol. 115] A Yes, I did.
Q Did you appeal this case?
A I couldn't.
Q Why couldn't you?
A Just how could I, sir? The district attorney refused Mr. Mangan's request. Who am I to—
Q Mr. Nowakowski—
A —appeal this case now?
Q Mr. Nowakowski, weren't you in front of the Superior Court of Pennsylvania in this regard, the district attorney alleged that you couldn't appeal it because you had broken out of jail and were gone?
A No, sir. I—in September—if you will give me the date—September 18 was it? On September 17—on Sep-

tember 16 I was sentenced. On September 17 I was told I was to be transferred to the penetentiary tomorrow, I escaped on the eighteenth, so there was two days after sentencing on the sixteenth. From the sixteenth to the eighteenth that I was transferred, there were no opportunities for me to make any appeal. It is true I was not held incommunicado in the County Jail.

Q You weren't?

A I can write a letter. Maybe it takes two days, but that is the only opportunity I had.

Q How long did you have to appeal a case like that? [fol. 116] A I had no idea what procedure to take, even after seven years I still do not have an idea.

Q You still don't know how long you have got to take appeal?

A No, sir, I do not. I have heard 35 days, 45 days, 90 days, I still do not know, because these laws are not available to me.

Q After the 17th of September, Mr. Nowakowski, had Mr. Mangan wanted to have appealed it, he would have difficulty. For what period of time, how long were you out of jail?

A Approximately—well, I was returned back on February 8, 1958 I believe. I believe that was the date.

Q You were gone from jail for three or four months?

A But I was—yes, sir.

Q Mr. Nowakowski, let's go back just a little bit to your arraignment before we finish up laboring this point. This night of July 13, 1957, the testimony shows in this trial that you were riding around with these fellows, around that night, weren't you?

A Yes, sir, I was.

Q And you picked up a tire iron, they say, is that correct? Did you have a tire iron?

A I didn't pick up no tire irons.

Q You heard all this testimony in court about your [fol. 117] activity with these two other fellows that night. Weren't you there?

A I heard it.

Q Did you ever tell Mr. Mangan that was all a big lie at the time?

A I told him I was innocent.

Q And when the officers attempted to apprehend you in this case, do you recall when that took place? Do you remember when you were driving a car, drove away, and the police had to chase you?

A I was driving Joan's car.

Q When they tried to stop you, you drove away at a high rate of speed. Do you recall that?

A Yes, sir, I did.

Q What was the reason you gave for doing that?

A Because just about maybe an hour and a half before that, I talked to my niece on the telephone, she told me that, "The parole board, parole officer is here, he is going to return you back to prison as a parole violator," because I did not report to him every thirty days, and as I did not report to him. This, being recently released and still under some detention, I just kept working and working and working, the days going by, I didn't realize it, but when she told me I was going to be returned back [fol. 118] to the parole officer because I didn't report to him, I immediately wanted to take flight.

Q During your trial you were asked some questions about Joan Logan, Pages 92 and 93, and you told Mr. Johnson I believe it was, that you didn't want to drag this girl into this, and you didn't want to tell them you were out at the house. You said, "That's right, because I was on parole."

So at the preliminary stage of this, isn't it a fact, Mr. Nowakowski, by your own testimony you kept Joan Logan's name out of this?

A No, sir, just in the early beginning.

Q And isn't it a fact that the first time Joan Logan's name really got into this thing was in September of 1957?

A No, sir, at the alderman's hearing. That may not be on record, but I did make a telephone call.

Q You are stating you brought Joan Logan's name into the case at the alderman's hearing?

A I mentioned her name, I wanted to make a telephone call.

Q Did you tell the alderman you wanted her present as a witness?

A I said I wanted to make a telephone call.

Q Did you tell the alderman you wanted Joan Logan present as a witness?

[fol. 119] A Yes, sir, I did, something of that nature. I don't recall the exact words.

MR. PEIFFER: I call the court's attention to the alderman's transcript, which shows no such matter included therein.

Q On Page 93 Mr. Johnson says, "Didn't you say that you thought you would cover up a few things because you were on parole?" Answer: "Outside of not bringing her name in, yes."

Question: "So you are willing to cover up what you did to protect your parole?" Answer: "Just her name. I didn't want to drag her through the mud. I was thinking her and myself too, you know."

Do you recall making that statement under oath in front of the court?

A If it is in the transcript, yes, I made it.

Q Mr. Nowakowski, on that same page—

THE COURT: What page?

MR. PEIFFER: Ninety-three.

Q Mr. Johnson asked the court: "If your Honor please, may we inquire as to whether a subpoena has been issued?" Answer by Mr. Mangan: "I have a subpoena in my pocket. I was going to take it over to her."

Mr. Johnson then asked: "Has the sheriff been requested to serve the subpoena, or has anyone from the [fol. 120] district attorney's office been requested to serve it?" Mr. Mangan says: "No. I inquired and she is out of town."

The court then said: "We will make that process available to you, Mr. Mangan, if you want it."

Do you recall that testimony?

A Yes, sir, I recall something of that nature.

Q Can you recall what the court said after that conversation, Page 94?

A No, sir, I don't.

Q The court says: "In fact, we are not going to conclude this afternoon and we will recess until tomorrow morning and you might ask the sheriff's office to serve that process."

Do you recall the judge telling Mr. Mangan that he might have the services of the Erie County Sheriff's office for that purpose?

A No, sir, I don't recall.

Q Now, you have stated you talked to Mr. Mangan about Joan Logan sometime at the start of this trial, your trial for burglary, and I believe from what you have stated I also understand you never spoke to him about Douglas Smith or what he might say. Is that right?

A No, sir, I don't remember that, don't remember asking me anything about it.

Q Now, Mr. Nowakowski, from the way this transcript [fol. 121] reads, I am a little bit confused by whether you wanted Joan Logan at the trial or not. Isn't it a fact that you really—what happened was you didn't want her at the trial to start with, but when you got partway through and saw Smith's testimony blow up, then you needed her, so you wanted her. Isn't that correct, isn't that the way it happened?

A No, sir, I told him before the start of the trial. Later on he told me he talked to her on the telephone so apparently I must have wanted her.

Q When did he get this subpoena he had in his pocket?

A I have no idea, sir.

Q When did he talk to her on the phone?

A I have no idea.

Q Mr. Mangan tells me he had those things all done two days before trial, this subpoena was already issued. Are you saying he could not have because—

A I am not saying he could have. I did not give him the information.

Q I believe Mr. Mangan said also that you felt, you had talked it over with him, and that at one stage you didn't think you needed her, another stage that she said she'd be there anyhow. Are you denying you ever had such conversation with Mr. Mangan?

[fol. 122] A At no time did I ever lead him to believe the witness was to testify for me.

Q Did you ever tell Mr. Mangan this witness would not willingly come?

A There was no conversation on that, the witness was to testify for me, assurance from her.

Q What time prior to the trial did she tell you she would come and testify for you?

A I cannot say. During the time I was incarcerated.

Q A week, two weeks?

A It could have been three weeks; I have no idea, sir.

Q You have stated of course she visited you in jail?

A Yes, sir.

Q Then is when she promised she'd come and testify you were with her that night?

A Well, she came to visit. I made, jokingly said, "Bring me some magazines." She said just let her know what day the trial is going to be and she will testify for me.

Q That is what you told Mr. Mangan, she would be there?

A Yes, sir.

[fol. 123] Q But she wasn't, unfortunately, was she?

A No, because it was on the eleventh I was standing trial.

Q Did you instruct Mr. Mangan, give him any special instructions about what to do to get her there?

A No, sir, gave him her name and address, telephone number.

Q You knew what a subpoena was, didn't you?

A No, sir, I am not too—

Q You were twenty-six years old.

A And I still did not have too much knowledge.

Q You knew a jury ought to be polled, but you didn't know what a subpoena was?

A I said I didn't have too much knowledge of a subpoena.

Q When Mr. Mangan spoke up and said he had a subpoena for her, did you know what he was talking about?

A No, I didn't.

Q You mean to tell me you didn't know what the judge was saying when he said, "We will make that process available to you," and the sheriff could do it?

A The sheriff could serve it, I had a general idea.

Q Now as you look back on this thing, Mr. Mangan didn't do such a bad job?

[fol. 124] A He did a very poor job, sir.

Q You are going to stand on the record as showing that?

A I am standing on the record for the past seven years I have fought this case. If you notice, 144 pages contained in the petition I am referring to.

THE COURT: You mean the petition you filed contained 144 pages?

THE WITNESS: Yes, sir.

Q Did you write this all yourself?

A Anyway I could get help here and there.

Q Did somebody help you?

A I mean give you laws, no.

Q Mr. Nowakowski, you cite a number of cases in this petition?

A Yes. You will find many errors.

Q There are many cases cited. Did you look all those cases up and read them?

A What knowledge I had on them. I could not afford an attorney.

Q You say someone helped you on this; how much did you pay out to have this printed?

A Nothing, sir. The efforts are mostly mine.

Q Did you pay any money out to have someone help you do this?

[fol. 125] A No, sir.

Q None whatsoever?

A No, sir.

Q This petition contains all the other opinions of the courts that have listened to this before, doesn't it?

A Yes. I filed every document introduced by the court.

Q Your petition has been refused consistently by all the courts, has it not?

A Yes, sir. I never received a hearing in the lower courts.

MR. PEIFFER: That is all.

REDIRECT EXAMINATION

BY MR. STOOPS:

Q Mr. Nowakowski, did you mention to Mr. Mangan that Douglas Smith had put the finger on you. Is that not correct?

A Yes, sir.

Q Did, at any time during that conversation with Mr. Mangan, did he state anything inconsistent with his statement at the bottom of Page 93, at the top of Page 94: "I have a subpoena in my pocket. I was going to take it over her?"

A I did not understand what he was saying.

[fol. 126] Q Did he say he had attempted to serve her already?

A No, sir.

Q Did you tell Mr. Mangan about the taxi ride from Joan Logan's house to your house, in order to corroborate the fact that you were there?

A Yes, sir, I did.

Q What was his reply?

A It would do no good.

MR. STOOPS: I have no further questions.

MR. PEIFFER: I have no further questions.

BY THE COURT:

Q You say Smith wasn't in jail with you?

A I don't know where he was, sir. I don't know if he was on bond or in jail. I was in the second range.

Q At the alderman's office, you told him you wanted to call this—Mrs. Logan; is that her name?

A Yes, sir.

Q How come her name is Servido now?

A That is her marriage name. Joan Logan is her maiden name.

Q What else did you say at the alderman's offices?

A I don't recall. I pleaded not guilty.

Q Do you recall anything else?

A No, sir, I was—there was some discussion between, there were seven or eight of them—I was sitting in the [fol. 127] corner by myself.

Q Seven or eight of who?
A The prosecution. I was sitting all by myself in the corner. They were—the reason why I say—I didn't know if it was a hearing for all of us or was a hearing against me. I never did know.
Q Didn't you say that is where you wanted a lawyer?
A Yes, sir, I did.
Q What else?
A I was told that I—I told them I did not commit the crime.
Q Anything else?
A No, sir, that was all.
Q Smith said you did; is that right?
A Smith said I did and—
Q Who was the other man involved?
A Joseph Corcoran.
Q What did he say?
A I don't know what he testified to, sir.
Q You don't recall, or you didn't hear him?
A No, sir. He testified but it was—but I don't know if he said I was innocent or guilty or what he said.
Q You don't remember?
[fol. 128] A No, sir.
Q The next time you say you were in court was that arraignment on August 28?
A Yes, sir.
Q That is in the courthouse?
A Yes, sir.
Q And in the district attorney's office?
A This is inside the courtroom.
Q You were in the courtroom?
A Yes, sir.
Q What judge?
A The Honorable Samuel Roberts.
Q What did he say?
A He asked me—the district attorney spoke to me for about fifteen minutes in a chair, telling me that I was guilty, then he has a statement against me, and that I committed the crime. I told him I did not.
Q Whose statement did he say?
A Douglas Smith's statement.

Q That the district attorney had Douglas Smith's statement?

A Yes, sir.

Q Was Judge Roberts there all the time?

A No, sir, he wasn't listening to this.

Q I want to know what he said to you, Judge Roberts, [fol. 129] on August 28?

A He asked me, "How do you plead?" I told him, "I am not guilty, sir."

Q Who else was there?

A Just myself, sir.

Q Wasn't there a sheriff or something?

A There were guards, but they were seated in the back.

Q Was the district attorney there?

A Yes, sir, he had a piece of paper, asked me to sign it.

Q You pleaded not guilty?

A Not guilty.

Q Told Judge Roberts you were not guilty?

A Yes, sir, I told Judge Roberts I was not guilty.

Q Did he ask you if you wanted a lawyer?

A I don't remember, sir.

Q But the district attorney had asked you if you wanted a lawyer?

A Sir, he didn't ask me. He asked me if I had an attorney; I told him no.

Q That is the extent of that arraignment that you remember?

A Yes, sir.

Q Do you remember anything else?

[fol. 130] A No, sir, I don't.

Q Then you went back to jail?

A Yes, sir.

Q You told me in your petition, if I recall it right, that: "His court-appointed counsel, Thomas C. Mangan, Esq., did not confer with the petitioner until ten or fifteen minutes before his trial on September 11, 1957."

Now you are telling me that was a half hour?

A Well sir—well, what I mean by ten or fifteen minutes discussion, half an hour before the trial began.

Q You were leading me to believe he wasn't appointed until ten or fifteen minutes before the trial. You don't know when he was appointed?

A On the eleventh, sir.

Q How do you know that?

A It is in the transcript, says the eleventh.

Q What transcript?

A Well—

Q Show me. Give him the transcript.

A I mean my petition.

Q Tell me what page in the transcript it shows he was appointed on September 11?

A Well, it is on the first page. It says Thomas Mangan, Esq., for the defendant, September 11, 1957.

[fol. 131] Q That is what you mean by the fact that he was appointed on the eleventh?

A Yes, sir.

Q How much was the check that you had with you when you were arrested?

A Well, I had two checks; one for $72 and another one, where I worked, fifty some dollars.

Q How much cash did you have on you?

A Not too much cash. I left my, most of it at home.

Q How much did you have at home?

A About fifty dollars.

Q About $175, is that right?

A Let's see—about a hunder twenty five some dollars.

Q A hundred twenty-two in checks and fifty dollars at home, that makes $172.

A I had a check where I worked at for about fifty-six. I had just got paid about $72. That was the full amount there.

Q I asked you how much cash you had; you said you had cash at home, fifty dollars?

A Yes, sir, I had cash at home.

Q The cash plus the checks makes $172?

A I had about fifty dollars at home, and then I had

[fol. 132] a check for about $72 where I worked.

Q Who did you live with at that time?

A My mother and my niece.

Q Where did you work?

A Erie Enameling Company.
Q Whose home did you live in?
A With my mother and my niece.
Q Your mother's home or your home?
A It is rented.
Q She rented, or did you rent it?
A She rented, but I went there to live, and I paid my rent.
Q You gave this money to your mother and niece?
A Yes, sir.
Q Which one did you give it to?
A My niece.
Q When?
A It was in the morning, July 13.
Q You mean before you were arrested?
A Before I was arrested, yes, sir.
Q Before you were arrested?
A Yes, sir.
Q Did you ever ask her to give it back?
A No, sir, I didn't. I owed debts at home.
Q When the squire, the alderman wouldn't allow you [fol. 133] to call a lawyer, did you try to call a lawyer after that?
A No, sir. I was told my case—I was told by the alderman, "This is just to see if there is enough evidence to go before the grand jury." After that, well, I resigned myself to it.
Q He wouldn't call a lawyer for you?
A No, sir, he wouldn't let me call a lawyer.
Q Wouldn't let you call a lawyer. After the alderman's hearing, and before the trial, did you call a lawyer?
A No, sir.
Q Did you ask anybody to call a lawyer?
A It was mentioned at the district attorneys.
Q Did you ask anyone to call a lawyer for you?
A I asked my family to help me in the matter.
Q Did you ask your family to call a lawyer for you?
A Yes, sir, I believe I did, to help me.
Q Which member of your family did you ask to call you a lawyer?
A My mother and brothers and sister came down.

Q What lawyer did you ask them to call?
A There wasn't any particular lawyer, sir.
Q So far as you are concerned, you went to trial without a lawyer until about ten or fifteen minutes or a half [fol. 134] hour before the trial?
A Well, it was mentioned before that, sir.
Q Well, you say that the district attorney asked you if you had a lawyer?
A I told him no, sir, I didn't.
Q That is all that was ever mentioned; you never called anybody, didn't know anything about a lawyer until ten or fifteen minutes or a half hour before the trial. Is that correct?
A That is correct, sir.
Q What did you expect this Joan Logan to testify to if she were called; what would she have said?
A That I was at her home.
Q Beginning when?
A About three o'clock in the morning.
Q What date?
A On July 13, 1957.
Q How long did you stay?
A It was daylight when I left; it was—the taxicab said six-eighteen in the morning, fare picked up at 1705 West Fifteenth Street.
Q So you left at six-eighteen in the morning?
A Yes, sir, I did.
Q What were you doing all that time?
A Well, I fell asleep on the couch there.
[fol. 135] Q On whose couch?
A On her couch.
Q Whose home was this?
A Joan's.
Q What was her name?
A Joan Logan.
Q She wasn't married then?
A Yes, sir, she was married.
Q Who was she married to?
A Mr. Servido.
Q Then her name was Mrs. Servido?
A Mrs. Servido.

Q What were you doing in her house?
A Well, I—I knew her before she got married.
Q Where was her husband?
A Her husband was incarcerated.
Q You knew that?
A Yes, sir, I did.
Q You tell me this woman would have so testified if she were brought into that trial?
A Yes, sir, she would have testified.
Q That you came to her house at three o'clock in the morning July 13, 1957, and stayed until six-eighteen a.m.?
A Yes, sir.
[fol. 136] Q Then you left in a taxi?
A Yes, sir.
Q You say she told you that she would so testify?
A She told—came down to the County Jail and visited me, and she said she would testify for me.
Q Did you tell her when the trial was?
A I didn't know when.
Q Did you ever tell her when the trial was?
A No, sir. I didn't know when the trial was.
Q Where did she live?
A 1705 West Fifteenth Street, Erie, Pennsylvania.
Q Where is she now?
A I do not know.
Q When did you last hear from her?
A When she visited me at the County Jail.
Q That is before the trial?
A Yes, sir.
Q Did you ever hear from her since the trial?
A No, sir, I have not heard from her.
Q She never wrote you a letter?
A No, sir. No letters are permitted of that nature. They return them. I tried, attempted to write to her, and they returned them back to me.
Q So you don't know where she is?
A No, sir, I do not.
[fol. 137] Q Do you know where her husband is?
A Her husband is with her, sir.
Q How do you know that?

A Well, at home I presume, just assuming.
Q Then you don't know?
A No, sir, I don't
Q How do you know he isn't still in jail?
A He only had about nine months to go. As I remember it, I understand he made parole.
Q What else do you want to tell me?
A Nothing, sir.
Q You did say something about witnesses talking to the jury?
A Yes, sir, this is true.
Q You don't want to tell me anything about that?
A Yes, sir, I did.
Q What about that?
A Well, it was during one of the recesses, that there is no—that I can see, any procedure for the members of the jury to go any special place, and my guard, Tony DeSontis took me into the hallway where they were smoking and walking back and forth, and at the steps was Joseph Corcoran and two members of the jury laughing and joking, and I asked Mr. DeSontis, this guard, he said, "They are not, probably not talking about [fol. 138] you, they are probably talking about old times, they are friends, they are probably talking about old times," and I went back in the courtroom, and he started to sit down. I mentioned this to Mr. Mangan. He never said a word to me, just looked at me and said nothing.
Q Who is Joseph "Corbin"?
A He was a witness for the prosecution.
Q What kind of a witness?
A He was the driver of the automobile that took us out to the Green Garden Tavern.
Q Who do you mean by "us?"
A Douglas Smith and myself.
Q He wasn't a defendant?
A No, sir, he was—
Q Is that all he testified to?
A I don't recall the testimony he gave, sir.
Q Is that all he did, was take you and Smith out to the Green Garden Tavern?

A Well, yes, sir, then I left them behind. What happened after that I don't know.

Q He wasn't in on this burglary?

A No, sir, I did not leave the property—the highway.

Q "Corbin" wasn't in on this burglary?

A Yes, sir.

[fol. 139] Q Was "Corbin" in it?

A Corcoran was.

Q Was he a defendant?

A He was a witness for the prosecution.

Q Well I mean, was he a burglar, was he accused of being a burglar?

A Yes, sir, he was.

Q What happened to him?

A He pled guilty and received probation or something.

Q Who all pleaded guilty?

A Douglas Smith and Joxeph Corcoran.

Q He was in on this robbery?

A Well yes, sir.

Q He didn't say you were in on it, did he?

A No, sir, the testimony that he gave, that he drove myself—drove Douglas Smith and myself out to the Green Garden Tavern and that—something about all three of us put our wallets in the glove compartment, after the crime was to be committed, "You get your identification back." When we got out there I told him I didn't want no part, I took my identification. An argument ensued between Douglas Smith and I, I turned around and walked up the dirt road and—

[fol. 140] Q "Corbin" didn't say you were one of the robbers?

A No, sir, not that I recall.

Q Smith said you weren't?

A Smith said I was, and I wasn't.

Q "Corbin" never said you were a robber?

A No, sir, not that I remember.

Q Even at the trial?

A No, sir, I don't recall.

Q You would remember; you remember what Smith said?

A Well, I remember some of the testimony. They took us out then. He took us out there. I don't know what testimony Joseph Corcoran gave, sir.

Q You don't know what he was talking about to the jurors?

A No, sir, I don't.

Q How do you spell that man's name?

A C-o-r-c-o-r-a-n.

Q I have been calling him "Corbin." It is Corcoran?

A Corcoran.

Q We are both talking about the same man regardless of what I called him. Is that right?

A Yes, sir.

Q What else do you want to complain about?

[fol. 141] A Well, the testimony that Douglas Smith gave at the aldeman's hearing. There were about five or six in there, and they were accusing me of the crime. I told them I was innocent. Douglas Smith said he was guilty and that I was guilty. Now, in the courtroom Douglas Smith took the stand and he said he was innocent. Looking at it today, sir, at that time I just—everything was just going by me, I wasn't understanding the court procedure at the court laws. The district attorney had asked for a recess, they went into another courtroom where after—they stopped the trial, then they had discussion in there, and they brought him back, put him back on the witness stand again, and this time he says he is not guilty and I am not guilty, and I thought that was very damaging to me.

Q Why?

A Because he had pleaded guilty, he gave the police everything that they had, gave them all the testimony that they had. Now for him to have all this against him, all the evidence against him, the documents against him, and the money that they had taken off of him, for him to turn around and say "I am innocent," it seems like he is trying to cover up for me, and I thought that was very damaging to the defense. This is why I always refer to [fol. 142] it as—I didn't call it tainted testimony, because I always looking at it from a perjury view.

Q That is what you called it in your petition, perjury?
A Yes, sir, I did.
Q What is the perjury?
A Douglas Smith. Well, I don't know what the perjury is, sir. The way they have it cited, that Douglas Smith said he was guilty, he said Nowakowski was guilty; then he says—Douglas Smith said he was not guilty, he said Nowakowski is not guilty. These two names are on the same document, and two different testimony, so I don't know if they are charging me with—he perjured me, or he perjured himself, or just which way that perjury is going.
Q Do you know why he committed this alleged perjury?
A No, sir, I have no understanding why he did it, except that he tried to, at one point in the trial he says, "I did it to get even with Nowakowski," for what I did to a couple of his friends, and I don't know what he is talking about.
Q Did you ever see him since?
A No, sir, I haven't seen him.
Q Do you know where he is?
[fol. 143] A I believe he is on parole, sir.
Q Who wrote this 144 page petition?
A That is a series of petitions that I had filed over seven years.
Q Who printed it?
A That one is mechanically—I printed that mechanically, and the other ones, I just put on top and go over it, letter for letter.
Q How was that made out, mechanically?
A It is a—sort of like a board that has letters in it, and one part, you just take this point, you run it over the letter and then another part of the page, it prints.
Q What do you call it?
A There is a name for it, sir; I can't think of it.
Q It is not a typewriter?
A No, sir, it is a mechanical process, a handtype of work. You do it letter by letter.
Q When did they get it down in the penitentiary?
A They didn't, sir, it belonged to another man; he was a "con" to another institution. I asked him if I could use it, he told me I could use it.

Q Where is it now?
A I don't know.
Q Did he take it with him?
[fol. 144] A I believe he did, sir.
Q I wish they had left it around there. Most of them I get are hand-written, I can't hardly read them. Who operated this thing?
A Well, I had to do it. See, that was sort of—you are not permitted to have this sort of thing.
Q Did you do it?
A Yes, sir, a good bit of it.
Q Not all of it?
A No, sir. My hands were practically numb, calloused, it was just—I had asked some friends to help me. It took six months.
Q Who told you what to say in all these things?
A Well, I got the Clerk of Court's copy. They wanted everything. I think that is Question 17; they said they want every document, every opinion, every court matter, everything that I had obtained in all the courts in all the years back, and so I had to—
Q That is what?
A That is the question 17 or 18 I believe it was. That is why I had to file all that.
Q That is what is attached to the petition, the one before me?
A Yes, sir.
Q But you wrote lots of petitions before that?
[fol. 145] A Just those, sir. Just the ones I filed.
Q About five or six of them?
A Yes, sir.
Q Who told you what to write in those?
A It comes in discussions in the institutions, sir. You try to, try to find your way, try to obtain information, try to study a transcript and—just sort of a minute by minute process day after day, just trying to figure it all out.
Q No particular person?
A No, sir.
Q No penitentiary lawyer?

A No, sir. Well, there was some help, sir, but it was mostly my doing.

Q Mostly your doing?

A Yes, sir.

Q I can see its been substantial. You wrote all these petitions yourself?

A Yes, sir.

Q After listening to some discussions?

A Discussions and reading.

THE COURT: Anything else?

MR. STOOPS: I'd like to call Mr. Mangan back for one more question.

THE COURT: Anything else, Mr. Peiffer?

[fol. 146] MR. PEIFFER: Nothing else.

(Witness excused.)

THOMAS C. MANGAN

was recalled and testified further as follows:

RECROSS EXAMINATION

BY MR. STOOPS:

Q You previously related in your testimony that you had attempted several times to serve this Mrs. Joan Logan Servido prior to trial?

A I recollect that I made some effort to serve her. I don't know whether it was more than once. I know I did go out there at least once.

Q Is this statement correct, at the bottom of Page 93 and top of Page 94 of the trial transcript, which states: "I have a subpoena in my pocket. I was going to take it over to her."

A It is in there, but I recall that I did attempt service prior to this time, prior to the date of the trial.

Q Prior to the date of trial you attempted to serve it?

A Yes.

Q Did you tell Mr. Nowakowski of this fact?

A I presume we discussed it sometime prior to trial.

[fol. 147] Q You have no recollection?

A I have no recollection, no.

Q You did not see fit to tell the court that you had already tried to serve this subpoena?

A I think, I may have said I was going to take it, but I may have—I may have meant at the time that I had tried. I don't recall. I do recall that I did drive some place in the City of Erie and make inquiries in the neighborhood as to this lady.

MR. STOOPS: I have no further questions.

BY THE COURT:

Q You were served by the marshal in this case?

A Was I served by the marshal? Yes. I was, your Honor.

Q Were you paid your expenses?

A No, I wasn't, your Honor.

Q Why; did you tell them you didn't want them, or anything?

A No, I didn't tell them. As I understand from what it says on the subpoena, where it is the court order, fees are not payable in advance. They are payable at a later date.

Q What about your expenses?

A I came down, the other day, I have here I drove down, and will drive back today, stayed over last night.

[fol. 148] THE COURT: Be sure you get them before you leave.

THE WITNESS: I will try.

THE COURT: You are entitled to a witness fee and your expenses.

Anything else?

MR. STOOPS: I have nothing further, your Honor.

(Whereupon at 12:35 o'clock p.m. court was adjourned.)

[Reporter's Certificate to Foregoing Transcript Omitted in Printing.]

[fol. 149]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

UNITED STATES OF AMERICA, EX REL.
EDWARD JOHN NOWAKOWSKI

vs.

JAMES F. MARONEY, Superintendent
State Correctional Institution

OPINION

Marsh, District Judge.

On September 12, 1957, in the Criminal Court of Erie County, Pennsylvania, at No. 10 September Sessions, 1957, the relator was convicted by a jury on an indictment accusing him, Douglas Smith and Joseph Corcoran [1] of burglary, larceny, and receiving stolen goods.[2] He was sentenced to imprisonment for a term of not less than 3 years nor more than 7 years by Judge Samuel J. Roberts, who presided at the trial.

The relator, having exhausted his state remedies, applied for a writ of habeas corpus in this federal court. A rule to show cause was issued.

The return of the respondent shows that on June 6, 1964, by order of the Pennsylvania Board of Parole, the relator was granted parole on this sentence; the parole will expire December 6, 1966. He remains, however, in physical custody of the respondent pursuant to a 4 to 10 year sentence imposed for prison breach at No. 74 Feb- [fol. 150] ruary Sessions, 1958, by the Criminal Court of Erie County. A prisoner on parole remains "in custody"

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[1] Smith and Corcoran pleaded guilty to the indictment.

[2] The count charging receiving stolen goods was apparently withdrawn. See Trial Transcript (hereinafter referred to as T.), p. 96.

within the federal habeas corpus statute, 28 U.S.C. § 2241. See: *Jones* v. *Cunningham*, 371 U.S. 236 (1963); *United States* v. *Fay*, 313 F. 2d 620 (2d Cir. 1963); *United States ex rel. Brewer* v. *Maroney*, 315 F. 2d 687 (3d Cir. 1963). Accordingly, we think this court has power and is required under the habeas corpus statute to entertain and adjudicate relator's petition for the writ which alleges the following grounds:

1. That he was denied a trial before a fair and impartial jury (petition, p. 1).
2. Perjury (petition, p. 5, ¶ 11(a)).
3. Ineffective aid and assistance of counsel (petition, p. 5, ¶ 11(b)).
4. "Two Commonwealth [jurors] were permitted to informally talk, with a Commonwealth witness [sic]" (petition, p. 5, ¶ 11(c)).

Counsel was appointed and relator was ordered to amend his petition and state facts in support of the conclusory averments therein contained. See: *United States* v. *Derosier*, 229 F. 2d 599, 601 (3d Cir. 1956). An amendment was duly filed averring facts only in support of the third ground, i.e., ineffective aid and assistance of counsel. Thus, relator did not place in issue by averment of facts in support thereof grounds 1, 2, and 4.

At the argument on the rule to show cause, counsel for relator stated that only the ground averring ineffective aid and assistance of counsel would be pressed. It is to be observed that grounds 1, 2 and 4 were repeatedly set forth in relator's five petitions for the writ in the state court and were held insufficient to obtain relief for reasons with which we are fully in accord.[3] Moreover, [fol. 151] at no time did relator aver that the perjured

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[3] See the petitions, orders and opinions filed in the Court of Common Pleas of Erie County at No. 212 May Term, 1959, No. 575 September Term, 1959, No. 376 May Term, 1960, No. 83 May Term, 1962, and No. 420 September Term, 1963. The order at No. 376 May Term, 1960, was affirmed on the opinion of Judge Roberts, 194 Pa. Super. 24, 166 A. 2d 559 (1960). The order at No. 420 September Term, 1963, was affirmed on the opinion of Judge Evans, 202 Pa. Super. 165, 196 A. 2d 396 (1963), application for allocatur denied February 24, 1964.

testimony was knowingly used by the prosecution. In this respect he failed to allege a violation of his rights under the Fourteenth Amendment. *Cf. United States ex rel. Helwig* v. *Maroney*, 271 F. 2d 329, 332 (3d Cir. 1959). At no time has he averred that the trial judge was apprised of the alleged conversation with the jurors, or alleged facts showing the circumstances surrounding the alleged conversation, or demonstrated that he was in any manner prejudiced thereby. Assuming that such a conversation occurred, it cannot be said that relator was a victim of fundamental unfairness or that he was deprived of due process by the state court.

We held an evidentiary hearing to determine the validity of the third ground. It is our opinion that the relator failed to sustain his burden of proof and that the petition for the writ should be denied.

From the evidence we find the following facts:

On July 13, 1957, the Green Garden Tavern in Erie was broken into and robbed. The relator, Douglas Smith, and Joseph Corcoran were arrested and charged with burglary, larceny and receiving stolen goods. At the preliminary hearing before Alderman Kinecki, Smith and Corcoran pleaded guilty, and relator pleaded not guilty; Smith implicated the relator as one of the burglars (see transcript of Alderman Kinecki). Subsequently, the [fol. 152] relator, Smith and Corcoran were indicted. Pending relator's trial, he was confined in the Erie County Jail. At the time of trial, he was 27 years old and was on parole for a prior conviction.

On August 28, 1957, relator was brought into court and in the presence of Judge Roberts and the District Attorney, it was ascertained that he desired to plead not guilty and was without counsel.[4] About a week or 10 days prior to trial, the District Attorney notified Thomas E. Mangan, Esq. that he had been appointed by the court to represent relator.[5] Mr. Mangan visited the relator at

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[4] Transcript of habeas corpus hearing (hereinafter referred to as H.T.), pp. 34, 72-73. We think relator erroneously designated this appearance as an arraignment.

[5] H.T., pp. 3, 21.

least once in the county pail and discussed the facts with him. Relator told his attorney that on the night the crime allegedly was committed he was at the home of one Joan Logan (Servido), a married woman, whose husband was then in prison,[6] and he assured counsel that she would testify for the defense at the trial.[7] In a telephone conversation, Mrs. Servido told Attorney Mangan that she would come to the trial and testify for the relator. However, counsel suspected that some reluctance might develop. Consequently, he made reasonable efforts to interview her, and on September 9th secured a subpoena for her appearance. From his discussion and investigation, Mr. Mangan determined that relator's best defense was to prove an alibi.[8]

[fol. 153] On September 11, 1957, relator was arraigned before Judge Roberts and pleaded not guilty (see indictment). The trial began that same day. Relator took the stand and denied that he had committed the crimes and tried to prove the alibi. Mrs. Servido did not voluntarily appear at the trial.[9] At 4:10 o'clock on the first day of the trial, the court adjourned until 10:00 o'clock the next day and advised that the services of a sheriff were available to subpoena Mrs. Servido, but neither the sheriff nor Attorney Mangan were able to find her.[10] Counsel did not request a continuance and the defense rested.[11]

Other than the foregoing, due to the lapse of over 7 years, Attorney Mangan understandably could not recall the specific details of his preparation, witness interviews and investigation of the case. He retained an impression that his preparation was adequate and he does not have any regrets concerning the strategy and tactics he employed at the trial.[12] He did recall that when the verdict

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[6] H.T., pp. 11, 78-79.

[7] H.T., p. 66.

[8] H.T., pp. 3, 11, 15-16; defendant's Ex. 1.

[9] H.T., pp. 19, 25, 65; T., p. 93.

[10] H.T., pp. 19, 25, 64; T., pp. 93-94.

[11] H.T., pp. 25-26; T., p. 95.

[12] H.T., pp. 21-22.

of guilty was returned, relator asked him to have the jury polled, and this was done. He also recalled that the relator complimented him on his handling of the trial, which complement was fixed upon his memory because clients whom he has since defended by appointment have not been so laudatory.[13] It is evident that relator was in fact well satisfied with Mr. Mangon's efforts at the trial because in his first two petitions for the writ, presented to the state court in 1959,[14] he did not express any dis- [fol. 154] satisfaction with Mr. Mangan's services at the trial.

In two state court petitions for the writ, No. 575 September Term, 1959 (petition, Ex. E, p. 24) and No. 83 May Term, 1962 (petition Ex. P, p. 70), relator stated that he "and his counsel made lots of efforts to try to locate said witness [Mrs. Servido] which would prove that petitioner could not possible committed said crime; but could not until after the trial [sic]."

In his third petition at No. 376 May Term, 1960, he did allege that he had not received the effective aid and assistance of counsel, but Judge Roberts, who had presided at the trial, stated in his opinion denying relief:

> "This contention is unsupported by the record and is without merit. An examination of the record indicates clearly that he was adequately and competently represented by alert counsel throughout the entire trial. * * *
>
> "Our review of the record satisfies us again that petitioner had a fair and impartial trial upon the merits, that he was properly represented by competent counsel during all phases of the trial and that the jury returned a proper verdict."

This decision was affirmed by the Superior Court of Pennsylvania upon the opinion of the trial judge. *Commonwealth ex rel. Nowakowski* v. *Maroney*, 194 Pa. Super. 24, 166 A. 2d 559 (1960).

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[13] H.T., p. 21.

[14] Nos. 212 May Term, 1959, and 575 September Term, 1959.

From our examination of the trial transcript, we find that relator did receive the effective aid and assistance of counsel. Perfection is not required. Success is not required. The omission to call to the attention of the court the observed conversation of the witness, Corcoran, with two members of the jury during a recess, and the failure to make any objections to allegedly inadmissable testimony were decisions of counsel which involved skill, judgment and strategy. In the light of the strong circum- [fol. 155] stantial evidence against relator, counsel may well have determined not to risk antagonizing the jury by a motion for mistrial (which might have required embarrasing interrogation of jurors), and to refrain from making repeated objections to testimony or relying upon technicalities, but, instead, to attempt to gain the favor and support of the jury by presenting the testimony of a candid client. Likewise, counsel's failure to move for a continuance until Mrs. Servido could be found was a matter for counsel's discretion. The judge may or may not have granted the motion since such is largely within the sound discretion of the court. And from the record we cannot see how a continuance would have benefited the relator because from the time of trial through the habeas corpus hearing in 1965 relator did not hear from Mrs. Servido nor did he know here whereabouts.[15] The subpoena issued by order of this court for her presence at the habeas corpus hearing was ultimately returned "N.E.I." by the Marshal.[16] We can but conclude that Mrs. Servido was not and is not available as a voluntary or involuntary alibi witness in behalf of relator. In any event, with respect to the failure to move for a continuance, we cannot substitute our judgment for that of counsel who was familiar with every phase of the trial. Similarly, a motion for a new trial and the taking of an appeal generally involve matters of judgment and discretion, and the failure to take such steps in this case cannot be said to establish

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[15] H.T., pp. 80-81.

[16] See subpoena issued in January for hearing on February 8, 1965.

lack of due process without substituting our judgment for that of trial counsel.[17]

[fol. 156] Despite relator's testimony to the contrary, the trial transcript shows that the jury was impaneled, accepted, and sworn in the presence of the defendant.[18]

Mr. Mangan was admitted to the bar in December, 1955, and was a member in good standing. This case was not his first criminal trial.[19] He was not experienced in criminal and civil trial work at that time, but he gave his client complete loyalty, served him to the best of his ability, and the service rendered was of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice.

We conclude from the record that the representation of relator by Attorney Mangan was not so lacking in competence that it became the duty of the court or the prosecution to observe it and correct it. *In re Ernst's Petition*, 294 F. 2d 556, 558 (3d Cir. 1961); *United States ex rel. Darcy* v. *Handy*, 203 F. 2d 407, 427 (3d Cir. 1953); *Diggs* v. *Welch*, 148 F. 2d 667, 670 (D.C. Cir. 1945).

In addition, we do not think that lack of due process can be bottomed solely upon counsel's lack of criminal trial experience, for, as every trial judge and prosecutor knows, sincere young lawyers trying their first few cases generally prove to be dangerous antagonists. The specific challenges to Mr. Mangan's actions and omissions in the conduct of the trial do not show lack of due process because they could well have been part of a rational plan of a competent young lawyer trying to do his best for an indigent client with a weak defense. The Constitution does not require the state to provide more than that in the way of effective assistance of counsel. *In re Ernst's Petition, supra*, p. 560.

[fol. 157] The defense of relator does not appear to have been a pretense or farce. The judge and the District At-

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[17] It may be observed that following relator's sentence, he escaped from prison on September 18, 1957, and was not returned until February 11, 1958.

[18] T., p. 1.

[19] H.T., pp. 26-27.

torney could not have detected and labeled the defense as a false show, if it were one; nor can we now do so with any degree of certainty. The trial as a whole cannot be categorized as a farce or mockery of justice. See: *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *In re Ernst's Petition, supra; United States ex rel. Darcy* v. *Handy, supra; Diggs* v. *Welch, supra; United States ex rel. Thompson* v. *Dye*, 103 F. Supp. 776, 778 (W.D. Pa. 1953), *aff'd* 203 F. 2d 429 (3d Cir. 1953).

Moreover, when a trial judge of the caliber of Judge Roberts, now a Justice of the Supreme Court of Pennsylvania and noted for his opinions upholding the rights of accused persons, rejects out of hand charges of incompetence and ineffectiveness, this court is quite satisfied that such charges are without merit.

An accusation of ineffective assistance by defense counsel is easily made after conviction and is not easy to disprove, especially after the lapse of seven years. Unfortunately, it too frequently happens that reputable members of the bar who have gratuitously given of their time and efforts to defend indigent defendants are recklessly charged, after conviction, with incompetence. To many a criminal, no trial and no jury is fair when the verdict is guilty and no lawyer has rendered competent and effective assistance if he is convicted, regardless of the evidence against him.

Viewing the record of the trial and the habeas corpus hearing as a whole, it is our conclusion that the Common- [fol. 158] wealth cannot be convicted of denying effective aid and assistance of counsel to the relator in violation of his right to due process under the Fourteenth Amendment.

We extend our sincere thanks to Charles C. Stoops, Jr., Esq. for the extensive time and effort he has devoted gratuitously in arguing the rule to show cause, preparing the amendment to the relator's petition, preparing a petition for witnesses, representing relator at the habeas corpus hearing, and preparing briefs.

An appropriate order will be entered.

[fol. 159]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER OF COURT—April 28, 1965

AND NOW, to-wit, this 28th day of April, 1965, after hearing, and upon due consideration of the entire record before me and the brief submitted by relator, IT IS ORDERED that the petition of John Nowakowski for a writ of habeas corpus be and the same hereby is denied.

/s/ Rabe F. Marsh
United States District Judge

cc:

Edward John Nowakowski, C-7409
Box 9901
Pittsburgh 33, Pa.

Charles Stoops, Esq.
525 William Penn Place
Pittsburgh 19, Pa.

William A. Peiffer, Asst. District Attorney
Office of District Attorney
Erie, Pennsylvania

Attorney General of Pennsylvania
State Capitol
Harrisburg, Pa.

[fol. 159a]

[File Endorsement Omitted]

[fol. 160]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

* * * *

PETITION FOR REHEARING, REARGUMENT AND RECONSIDERATION—Filed May 11, 1965

TO THE HONORABLE, JUDGE OF SAID COURT:

AND NOW, May 11, 1965, comes relator who respectfully requests that this Honorable Court reconsider its opinion and order of April 28, 1965 or in the alternative grant the relator a rehearing and reargument on his petition for a writ of habeas corpus on the ground that the United States Marshal's Office inaccurately reported to the court that Joan Logan was living in Florida. The relator believes that she was and is presently residing with a Mr. Frank Servido at 1310 Shenk Avenue, Erie, Pennsylvania. The failure of United States Marshal's Office to locate Joan Logan and/or notify this Honorable Court of its inability to locate her prior to the commencement of the habeas corpus hearing deprived the relator of a full and fair hearing in that the relator was not given an opportunity to obtain important testimony that he firmly believes would have rebutted the testimony of Thomas Mangan, Esq., which was adopted as a fact by this Honorable Court in its opinion and resulted in an order adverse to the relator's interest.

Respectfully submitted,

/s/ Charles C. Stoops, Jr.
CHARLES C. STOOPS, JR.
Attorney for Relator

[fol. 160a]

* * * *

[File Endorsement Omitted]

[fol. 161]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

UNITED STATES OF AMERICA, EX REL.
EDWARD JOHN NOWAKOWSKI

vs.

JAMES F. MARONEY, Superintendent
State Correctional Institution

MEMORANDUM OPINION—May 14, 1965

MARSH, District Judge.

On January 21, 1965, the relator, by petition filed January 20, 1965, secured an order of court directing the United States Marshal to subpoena Joan Logan, West 32nd Street, Erie, Pennsylvania, for the habeas corpus hearing in this court at the cost of the United States. See also, petition for subpoena for JoAnn Logan, West 32nd Street, Erie, Pennsylvania, filed on January 6, 1965. The witness was not to be found and the Marshal eventually returned the subpoena N.E.I.

Relator now desires that I reconsider my decision denying the writ and, in the alternative, grant him a rehearing and reargument on the ground that the Marshal "inaccurately reported to the court that Joan Logan was living in Florida" (Tr. of habeas corpus hearing, pp. 51-53). This report, if such it was, was only a rumor; the fact of the matter was that Joan Logan could not be found. It is possible that this witness was not subpoenaed by the Marshal for the hearing, or by the Sheriff for the trial, because of the relator's evident reluctance to disclose her true name, viz: Joan Logan Servido, wife of Frank Servido, now allegedly residing at 1310 Shenk Avenue, Erie, Pennsylvania. No reason is stated why the correct name and address of Mrs. Servido could not have been furnished to the court and Marshal prior to the habeas corpus hearing.

[fol. 162] The state trial record does not mention the true name of the witness at all. It appears from that record that the appointed trial counsel, the trial judge and the Sheriff of Erie County were given only the name of Joan Logan (defendant's Ex. 1; Tr. of trial, pp. 89-90, 93).

The lawyer appointed by this court was given the name Joan Logan, West 32nd Street, Erie, Pennsylvania, for subpoena purposes (see request for subpoena). Indeed, it was only after prodding by the court, near the end of the habeas corpus hearing, that her true surname was brought out in the evidence (Tr. of habeas corpus hearing, pp. 78-81).

Thus, responsibility for the failure to produce the witness at the trial and, especially, at the habeas corpus hearing must rest in a considerable part, if not wholly, upon the relator.

Moreover, I am convinced that even if Mrs. Servido would be produced as a witness and would have a present recollection of the events which occurred in the early morning of July 13, 1957, when the burglary was perpetrated, and of the days preceding and during the trial which began on September 11, 1957, and would testify in accordance with the relator's hopes, it would not change my decision. For, from relator's own statements contained in prior petitions that he and his trial counsel made "lots of efforts" to locate this witness prior to trial, and from the record of the trial, I would remain convinced that the relator's constitutional rights were not violated in any respect by the Commonwealth of Pennsylvania.

An appropriate order will be entered.

[fol. 163]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER OF COURT—May 14, 1965

AND NOW, to-wit, this 14th day of May, 1965, after due consideration, IT IS ORDERED, ADJUDGED AND DECREED that the petition of Edward John Nowakowski for reconsideration of the order of court entered April 28, 1965 or, in the alternative, for a rehearing and reargument on his petition for a writ of habeas corpus, be and the same hereby is denied.

/s/ Rabe F. Marsh
United States District Judge

cc:

Edward John Nowakowski, C-7409
Box 9901
Pittsburgh 33, Pa.

Charles Stoops, Esq.
525 William Penn Place
Pittsburgh 19, Pa.

William A. Peiffer, Asst. District Attorney
Office of District Attorney
Erie, Pennsylvania

Attorney General of Pennsylvania
State Capitol
Harrisburg, Pa.

[fol. 163a]

[File Endorsement Omitted]

[fol. 164]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[Title Omitted]

MOTION FOR CERTIFICATE OF PROBABLE CAUSE—
Filed June 14, 1965

AND NOW, June 14, 1965, comes Edward John Nowakowski, relator herein by his attorney, Charles C. Stoops, Jr., Esq., and respectfully moves as follows:

1. That on September 12, 1957, in the Criminal Court of Erie County, Pennsylvania, at Number 10 September sessions, 1957, the relator was convicted by a jury along with one Douglas Smith and one Joseph Corcoran of burglary, larceny, and receiving stolen goods.

2. That the relator, having exhausted his state remedies, applied for a writ of habeas corpus in this Federal Court in October, 1964, and a rule to show cause was thereafter issued and made absolute on January 11, 1965.

3. That an oral hearing was held on the petition for the writ of habeas corpus on February 8, 1965.

4. That following such hearing and upon consideration of the entire record and the brief submitted by the relator, an Order of Court was entered by Marsh, D. J., on April 28, 1965, denying the petition for the writ of habeas corpus.

5. That relator on May 11, 1965, requested this court to reconsider its order of April 28, 1965, or in the alternative to grant the relator a rehearing and reargument on his petition for a writ of habeas corpus.

6. That on May 14, 1965, an order was entered by Marsh, D. J., denying relator's request for reconsideration of the Order of Court of April 28, 1965, and also denying the request for a rehearing and reargument on the petition for a writ of habeas corpus.

[fol. 165] 7. That relator respectfully submits that this court erred in concluding on the basis of the transcript of the record of the trial in the Criminal Court of Erie County in September, 1957, and on the basis of the testimony offered at the hearing on the petition for a writ of habeas corpus that relator was not denied effective aid and assistance of counsel at his trial in violation of his rights under the 6th and 14th Amendments of the U. S. Constitution; and that this court further erred in relying upon an inaccurate report furnished by the United States Marshall's office that an important witness was "in Florida" without giving the relator additional opportunity to obtain testimony which he believes would rebut the testimony on which this court based its findings of facts underlying its order of April 28, 1965.

WHEREFORE, petitioner respectfully requests this court to issue a certificate of probable cause to be used in taking an appeal to the United States Court of Appeals for the Third Judicial Circuit.

/s/ Charles C. Stoops, Jr.
/s/ William R. Hawkins
Attorney for Petitioner

[fol. 166]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER OF COURT—June 15, 1965

AND NOW, to-wit, this 15th day of June, 1965, upon motion of Charles C. Stoops, Jr., it is hereby certified that Edward John Nowakowski, relator herein, has probable cause for appeal.

/s/ Rabe F. Marsh
District Judge

[fol. 166a]

. . . . . .

[File Endorsement Omitted]

[fol. 167]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed June 15, 1965

Notice is hereby given that Edward John Nowakowski, relator above named, hereby appeals, in forma pauperis, to the United States Court of Appeals for the Third Circuit from the order denying its request for reconsideration or in the alternative for rehearing and reargument on his petition for habeas corpus entered in this action on May 14, 1965.

/s/ Charles C. Stoops, Jr.

/s/ William R. Hawkins
Attorney for Appellant

525 William Penn Place
Pittsburgh, Pennsylvania
15230

[fol. 168]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 64-1087

[Title Omitted]

MOTION FOR WITHDRAWAL OF COUNSEL—Filed July 8, 1965

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Motion is hereby made that the undersigned be permitted to withdraw their appearance as attorneys for the Relator because the demands of their corporate employment will not permit them sufficient time to adequately represent the interests of the Realtor in pursuing his appeal before the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Charles C. Stoops, Jr.
CHARLES C. STOOPS, JR.

/s/ William R. Hawkins
WILLIAM R. HAWKINS

Attorneys for Realtor

[fol. 169]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORDER—July 8, 1965

AND NOW, to-wit, this 8 day of July, 1965, upon motion of Charles C. Stoops, Jr. and William R. Hawkins, it is hereby ORDERED and ADJUDGED that Charles C. Stoops, Jr. and William R. Hawkins be permitted to withdraw their appearance as attorneys for the Realtor

because the demands of their corporate employment will not permit them sufficient time to adequately represent the interests of the Relator in pursuing his appeal before the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Rabe F. Marsh
D J

[fol. 169a]

* * * *

[File Endorsement Omitted]

[fol. 170]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 171]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. Misc. Rec. No. 199

UNITED STATES OF AMERICA, EX REL.
EDWARD JOHN NOWAKOWSKI, APPELLANT

vs.

JAMES F. MARONEY, Warden State Correctional Institution, Pittsburgh 33, Pennsylvania, RESPONDENT

PETITION TO PROCEED IN FORMA PAUPERIS—Received July 19, 1965

To: THE HONORABLE JUDGES OF THE ABOVE SAID COURT:

The petition of Edward John Nowakowski, respectfully represents:

That he presents simultaneously herewith a petition for appointment of counsel, directed to the above court

to review the opinion and order of the United States District Court for the Western District of Pennsylvania.

Appellant is a citizen of these United States, and is now without funds, and is unable to pay the costs of securing redress or give sufficient security therefore, he has no assets, real or personal and no income of any kind sufficient to pay costs of redress, Section 1915-1916, Title 28, U. S. C. A.

Wherefore, appellant respectfully prays your honorable court for an order authorizing him leave to proceed in "forma pauperis," and that this cause be docketed with-
[fol. 172] out the payment of costs or the giving of security therefore, and for appointment of counsel; and for further leave to proceed on hand written briefs in pursuance of 28 U. S. C. A. 1915.

And he will ever pray

Respectfully submitted

/s/ Edward John Nowakowski
Appellant pro-se

Sworn and subscribed to before me this
16 day of July 1965

/s/ William C. Schnupp
Notary Public

WILLIAM C. SCHNUPP, Notary Public
Pittsburgh, Allegheny County

My Commission Expires November 29, 1965

[fol. 173]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted]

PETITION FOR THE APPOINTMENT OF COUNSEL—Received July 19, 1965

To: THE HONORABLE JUDGES OF THE ABOVE SAID COURT:

Comes now, your appellant, Edward John Nowakowski, who respectfully motions this honorable court to appoint counsel to prepare and prosecute appellants' cause before this honorable court at a time and place so designated by this honorable court: Re: *U.S.* vs. *Glasser*, 116 Fed. 2, 690, Section 394, Title 18 U. S. C. A.

And he will ever pray.

Respectfully submitted

/s/ Edward John Nowakowski
Appellant pro-se

Sworn and subscribed to before me this
16 day of July 1965.

/s/ William C. Schnupp
Notary Public

WILLIAM C. SCHNUPP, Notary Public
Pittsburgh, Allegheny County

My Commission Expires November 29, 1965

[fol. 174]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted]

C. A. Misc. Record No. 199

(Dist. Ct. Civil No. 64-1087)

Present: BIGGS, *Chief Judge*, and KALODNER and FREEDMAN, *Circuit Judges*.

ORDER DENYING PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, ETC.—July 27, 1965

Upon consideration of appellant's petition for leave to proceed in forma pauperis and to file handwritten briefs; and for appointment of counsel in the above-entitled case;

It is ORDERED that the petition be and it hereby is denied.

By the Court,

/s/ Biggs
Chief Judge

July 27th 1965

[fol. 175]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. Misc. Rec. No. 99

In re # 64-1087 Civil Action

[Title Omitted]

Edward J. Nowakowski

vs.

James F. Maroney
1965

PETITION FOR RECORDS AND DOCUMENTS IN FORMA PAUPERIS—Received August 25, 1965

To THE HONORABLE JUDGES OF THE ABOVE COURT:

The Petition of Edward J. Nowakowski, respectfully represents:

And now comes the above named petitioner and states, that he is of legal age and a citizen of the United States of America and a pauper as defined by the laws and decisions of this court and the United States Supreme Court. See: *Draper* v. *Washington* 372 U.S. 487 decided March 18, 1963.

Petitioner contends he needs the transcript taken at his hearing in the District Court because it will prove his allegations of which he is appealing to the United States Supreme Court, and petitioner will need to go through said transcript to find the exact pages and what was said at said hearing by counsel, Thomas Mangan, of whom represented petitioner at his trial in the Court of Oyer and Terminer of Erie, Pennsylvania.

[fol. 176] Petitioner avers that the transcript will prove his allegation that he wasn't adequately represented by court appointed counsel at his trial by jury.

Petitioner also contends that he has new found evidence and will have to cite certain pages from the transcript of his hearing in the District Court.

Whereas, petitioner prays that he will be permitted to proceed in forma pauperis because of his indigent status, and that this Honorable Court will issue out an order to the clerk of this Court demanding said clerk to send a copy of said transcript, and any documents, exhibits, to petitioner in "forma pauperis."

And he shall forever pray.

Respectfully submitted

/s/ Edward John Nowakowski
Petitioner

Sworn and subscribed before me this
23 day of August, 1965.

/s/ William C. Schnupp
Notary Public

WILLIAM C. SCHNUPP, Notary Public
Pittsburgh, Allegheny County

My Commission Expires November 29, 1965

[fol. 177]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. Misc. Rec. No. 199

[Title Omitted]

PETITION FOR REHEARING, REARGUMENT AND RECONSIDERATION—Received September 24, 1965

To: THE HONORABLE, JUDGES OF SAID COURT:

And now, September 13, 1965, comes relator who respectfully requests that this Honorable Court reconsider

its opinion and order of July 27, 1965 and grant relator permission to proceed into this Court in "FORMA PAUPER- is because he is without funds to pay the twenty-five (25) dollars filing fee that this Court requests.

Attached as Exhibit (A) is relator's balance of his account at the time he filed into this Court, and as can be seen by Exhibit (A) there was insufficient funds to pay a filing fee.

Relator was granted a certificate of probable cause by the Western District Court.

Relator's Court appointed lawyer had to many civil cases to handle and petitioned the court to be relieved of his duty of making up an appeal into the Third Circuit Court of Appeals.

[fol. 178] Relator is at a loss because of his inability to prepare proper briefs into this Court, and he is to poor to hire an attorney to help prepare his petition into this Court.

Relator feels that he has a meritable cause and has "new found evidence" to help prove his complaint.

Wherefore, relator prays that this Honorable Court will grant him leave to file into this Court in "*forma pauperis*" because of his indigent status.

And he shall forever pray.

Respectfully submitted

/s/ Edward John Nowakowski
Relator

Sworn to and subscribed before me this
23 day of Sept 1965.

/s/ William C. Schnupp
Notary Public

WILLIAM C. SCHNUPP, Notary Public
Pittsburgh, Allegheny County

My Commission Expires November 29, 1965

[fol. 179]

EXHIBIT A TO PETITION FOR REHEARING, ETC.

July 15, 1965

TO WHOM IT MAY CONCERN:

I have checked the financial status of inmate No. C 7409, EDWARD NOWAKOWSKI, and find that he has

$ 10.40 to his credit at present

$——— no money to his credit at present

Very truly yours,

J. F. MARONEY
Superintendent

By:
/s/ William C. Schnupp
WILLIAM C. SCHNUPP
Cor. Casework Supervisor
Notary Public

[fol. 180]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C. A. Misc. Record No. 199

(Dist. Ct. No. 64-1087)

UNITED STATES OF AMERICA, EX REL.
EDWARD JOHN NOWAKOWSKI, APPELLANT

vs.

JAMES F. MARONEY, Superintendent
State Correctional Institution

Present: BIGGS, *Chief Judge*, and KALODNER and FREEDMAN, Circuit Judges.

ORDER DENYING A PETITION FOR RECORDS, ETC., AND DENYING A PETITION FOR REHEARING, ETC.—
October 4, 1965

Upon consideration of the "Petition for Records and Documents in Forma Pauperis", and of the "Petition for Rehearing, Reargument and Reconsideration",

It is ORDERED that each petition be and it hereby is denied.

By the Court,

BIGGS
Chief Judge

Dated: October 4, 1965

[fol. 181]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 182]

SUPREME COURT OF THE UNITED STATES

No. 1100 Misc., October Term, 1965

EDWARD JOHN NOWAKOWSKI, PETITIONER

v.

JAMES F. MARONEY, Superintendent
State Correctional Institution

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 13, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1404 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 234106 288

SUPREME COURT, U. S.

DEC 7 1966

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,

Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

DANIEL J. O'HERN
Attorney for Petitioner
195 Broad Street
Red Bank, New Jersey

November, 1966

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,

Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The orders of the court of appeals (R. 135, 140) are not reported. The opinion of the district court upon the petition for writ of habeas corpus appears in the record at R. 115.

Jurisdiction

The order of the court of appeals was entered on October 4, 1965 (R. 140). A petition for a writ of certiorari was filed on January 4, 1966, and was granted on June 13, 1966 (R. 141; —— U.S. ——). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether on application for leave to appeal in forma pauperis, the court of appeals without examining any legal memoranda by appointed counsel could deny an indigent criminal defendant the right to proceed in forma pauperis and the right to counsel, at a stage when a non-indigent litigant's appeal would not be similarly dismissed.

2. Whether the court of appeals abused the discretion vested in it under Section 1915 of Title 28 U.S.C. when it denied leave to appeal in forma pauperis to an indigent criminal defendant after the trial judge had issued a certificate of probable cause.

3. Whether the questions presented in the collateral attack proceedings were so frivolous as to justify a dismissal of the proceedings without the appointment of counsel and without a hearing.

Statute Involved

Section 1915 of Title 28 U.S.C. provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, ac-

tion or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. Any appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Statement

I. The State Court Proceedings.

In the early morning hours of July 13, 1957, the Green Garden Tavern in Erie, Pennsylvania was broken into and the contents of a pin ball machine, pool table and two cigarette machines, together with a small cash register, $60.00 cash from the register and $10.00 from the cash box were removed from the premises. (R. 33) On the same day three suspects were arrested and charged with the crime. Two of the men, Douglas E. Smith and Joseph Corcoran pleaded guilty to the charges. (R. 30) The defendant Edward John Nowakowski, the petitioner in this court, pleaded not guilty. (R. 31)

A preliminary hearing was held in the Alderman's Court on July 18, 1957 and the defendant Smith gave evidence against the petitioner alleging that the petitioner Nowakowski had been an accomplice in the robbery in the Green Garden Tavern. (R. 31) All three defendants were held for the grand jury and on August 28, 1957, the grand jury of Erie County returned an indictment against all three defendants charging them with burglary, larceny and receiving stolen goods. (R. 35)

On September 11, 1957, the petitioner was arraigned by the Erie County Criminal Court of Quarter Sessions and pleaded not guilty to the indictment. (R. 35) On the same day the Commonwealth proceeded to trial against the petitioner. The records of the Clerk of the Court annexed to petitioner's brief (App. 32) indicated that an appearance was entered in his behalf by a court appointed counsel Thomas C. Mangan, Esq. on the same date of September 11, 1966. The original docket for the court shows that on

the preceding day the co-defendant Douglas E. Smith had pleaded guilty to the indictment and was awaiting sentence. (App. 34). The third defendant, Corcoran was 16 at the time of the crime and no record appears of the disposition of his case. He was presumably treated as a juvenile.

The principal defense of the petitioner Nowakowski in the state court proceeding was an alibi—that he had been in the presence of one Joan Logan Servido during the hours of 3:00 A.M. to 6:00 A.M. on the morning when the crime was committed. (R. 106) His court appointed counsel failed or was unable to produce this witness at the time of trial. (R. 81) The alleged co-perpetrator Douglas Smith, when called upon to testify for the State, testified that neither he nor Nowakowski had any part in the burglary or the crime at the Green Garden Tavern. (R. 61) Thereupon, without objection, the Commonwealth was permitted to impeach Smith by reading to the jury the prior statement which he had made in the Alderman's Court. (R. 66) However, no cautionary instructions were given to the jury that the evidence with respect to the prior statement was for impeachment purposes only and could not be used as direct evidence of guilt. (R. 72) Following the trial by jury a verdict of guilty was entered on September 12, 1957. Prior to sentencing the petitioner escaped from the Erie County Jail but he was subsequently apprehended and sentenced to four to ten years on account of the prison breach and was sentenced to three to seven years on the indictment charging burglary, larceny and receiving stolen goods.

II. The Habeas Corpus Hearing.

After having exhausted all of his state remedies, (R. 50) petitioner made application in forma pauperis for a writ

of habeas corpus to the United States District Court for the Western District of Pennsylvania. By an amendment to the petition filed January 6, 1965, the allegations of the petition were narrowed to specify that petitioner was unfairly denied the aid and assistance of counsel as required by the Sixth and Fourteenth Amendments of the United States Constitution in that (1) his court appointed counsel, Thomas C. Mangan did not confer with him until ten or fifteen minutes before the trial and proceeded to try the case with no investigation of witnesses and facts. (2) The failure of his counsel to allow sufficient time to prepare the case resulting in the absence of the alibi witness, Joan Logan Servido. (3) The failure of his counsel to interview Douglas Smith before the trial permitted the District Attorney to bring him before the court and plead surprise at his testimony which would apparently have exculpated the petitioner. (R. 46) A hearing on the application was fixed for Monday, February 8, 1965 and subpoenas were issued for JoAnn Logan and for Thomas C. Mangan, Esq. (R. 48)

At the habeas corpus hearing, Mr. Mangan had little recollection of the trial which had occurred some eight years prior. He recalled that the trial had been interrupted when Douglas Smith had changed his testimony and admitted that Mr. Smith had not been interviewed prior to the trial and that Joan Logan, the alibi witness had not been interviewed prior to the trial. (R. 62, 65)

Mr. Mangan was not definite as to when he was actually appointed, although he said, "I presume that I was appointed at least sometime before Monday the 9th because I had a note to get a subpoena on that Monday. I did presume that it was sometime the week preceding that, or I would have no exact idea of how soon." (R. 71). It was

developed that there was not one objection in the whole trial despite the fact that the record was replete with hearsay testimony and other objectionable evidence and the trial judge did not instruct the jury as required by the laws of Pennsylvania, that the hearsay testimony as to Douglas Smith was for impeachment purposes and not substantive evidence. (R. 72)

The petitioner Nowakowski contended that the first time that he met his court appointed attorney was on the very morning of the trial (R. 78), a fact which was not controverted by Mr. Mangan. Petitioner testified that he then gave the name of his alibi witness to Mr. Mangan and that he (Mr. Mangan) talked with the witness on the telephone and that she was coming down to testify. (R. 80) Reference was made to the transcript of the original trial wherein Mr. Mangan said to the trial Judge late in the afternoon of the first day of trial: "I have a subpoena in my pocket. I was going to take it over to her." (R. 101) so that it appeared that no effort had been actually made to serve Joan Logan Servido until late in the afternoon of the first day of trial.

At the habeas corpus proceeding just as at the original trial, a snag developed as to the production of Joan Logan as a witness. The marshal was unable to serve Joan Logan at the address furnished and returned the subpoena unserved. (R. 90)

After the hearing the district judge concluded that after verifying the record of the trial and the habeas corpus hearing as a whole he was of the opinion that the petitioner had not been denied the effective assistance of counsel and an order to that effect was entered on April 28, 1965. (R. 123) Petitioner through his court appointed attorney,

sought a re-hearing on May 11, 1965, having located Joan Logan Servido at 1310 Shenk Avenue, Erie, Pennsylvania. The court chided the petitioner for failure to give the correct name to his court appointed counsel and said "indeed it was only after prodding by the court, near the end of the habeas corpus hearing that her true surname was brought out in the evidence" (R. 126).

The fact is that the petitioner had expressly referred to his alibi witness as Joan Logan Servido in his amended petition dated January 6, 1965, more than one month before the hearing. (R. 46) Indeed, Judge Marsh's memorandum opinion of January 11, 1965 expressly referred to the petitioner's allegation that because of the ineffectiveness of counsel, "the trial was permitted to proceed in the absence of an important alibi witness, i.e., Mrs. Joan Logan Servido". (R. 50)

A formal order denying the application for a re-hearing was entered on May 14, 1965. (R. 127)

III. The Proceedings on Appeal.

Pursuant to the provisions of 28 U.S.C. 1915 (a) the petitioner applied for a certificate of probable cause to the District Court and on June 15, 1965, the district judge issued the certificate of probable cause. (R. 129) On the same day, petitioner filed Notice of Appeal to the Court of Appeals for the Third Circuit from the order denying his petition for a writ of habeas corpus. (R. 130)

On July 8, 1965, the Pittsburgh attorneys who had represented petitioner in the habeas corpus proceedings asked to withdraw since they did not have "sufficient time to

adequately represent the interests of the [petitioner] in pursuing his appeal before the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania." (R. 131) Their petition was granted on the same day. Thereafter, on July 19, 1957, petitioner, *pro se*, petitioned the Court of Appeals for an order granting him leave to appeal in forma pauperis, that his cause be docketed without the payment of costs or giving of security, that counsel be appointed and that he be given leave to proceed on hand written briefs. Without assigning counsel to petitioner and without hearing him, the Court of Appeals denied his petition. (R. 135) A subsequent petition for rehearing was denied on October 4, 1965 (R. 140). It is from these orders that this appeal is taken.

Policy Involved

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U.S. 12, 19.

Summary of Argument

I.

The denial of leave to proceed in forma pauperis by the court of appeals constituted an invidious discrimination against an indigent defendant. In a long series of cases, commencing with *Griffin* v. *Illinois,* 351 U.S. 12, this court has consistently invalidated any procedure which did not give equal treatment to every litigant before the bar. Had the petitioner had sufficient funds to pay the clerk's filing fee, docket the record and file a brief, his case would have

been heard on the merits as soon after thirty days as the court calendar would permit. As applied by the court of appeals, 28 U.S.C. 1915 has been converted into a method of dismissing appeals of indigents without benefit of counsel, without briefs and without the appellate day in court made available to litigants of means. The statutory right to appeal under 28 U.S.C. 1291 from the denial of a writ of habeas corpus should not depend on a man's ability to pay.

II.

In any event, the court of appeals abused the discretion vested in it under 28 U.S.C. 1915 by denying petitioner leave to appeal in forma pauperis after the district court had issued a certificate of good faith. Had the petitioner been denied a certificate of probable cause by the district court, the court of appeals would have been obliged to provide the applicant with the assistance of counsel and with a record of sufficient completeness to give him full opportunity to show that the appeal is in good faith. *Coppedge* v. *United States*, 369 U.S. 438. In the course of such a proceeding at least the issues would be briefed by competent counsel and the petitioner would have the benefit of his appellate advocacy before his case was dismissed.

Much stronger is the claim of the indigent defendant for the right to proceed in forma pauperis where the trial judge who heard his case in the first instance has concluded that his appeal is not frivolous and is taken in good faith. To do as the court of appeals has done here is to circumvent this court's ruling in *Coppedge* and effectively deny petitioner an appeal on the merits and to abuse the discretion vested in the court by Congress.

ARGUMENT

I.

The Denial of Leave to Proceed in Forma Pauperis on Appeal From the District Court's Denial of a Writ of Habeas Corpus Constituted an Invidious Discrimination Against an Indigent Defendant.

The trial court pursuant to the terms of 28 U.S.C. 1915, *supra*, pp. 2-3, certified that petitioner's appeal was not frivolous and was taken in good faith. Petitioner's application to the court of appeals for leave to appeal in forma pauperis did not face the initial barrier ordinarily faced by indigent defendants of showing that the trial judge had improperly refused to certify his appeal as being in good faith. Nonetheless, the court of appeals, without appointing an attorney to represent petitioner, without granting him a transcript and without examining any legal arguments of counsel, decided that further proceedings in forma pauperis were not warranted. In effect, it denied petitioner an appeal from the judgment of the trial court. The procedure it used to reach that decision, as well as the decision itself are not warranted by the statute and are in conflict with the previous decisions of the court.

28 U.S.C. 1915 embodies two concepts. On the one hand an indigent defendant is entitled to an adequate appellate review of his conviction—a right at government expense, to present for review to an appellate court any issue not plainly frivolous. On the other hand, Congress has sought to prevent the courts from being burdened with frivolous appeals and has given district court judges the initial duty of sifting out frivolous appeals. If the trial judge certifies

that the appeal is taken in good faith, the court of appeals should simply grant the application to appeal in criminal cases in forma pauperis as a matter of course and should appoint counsel to brief and argue each case on the merits.

A. Any Procedural Device for Screening Appeals by Indigents Is Invalid If It Impinges Upon the Right of the Litigant to Equal Consideration Before the Courts.

It is now settled that a state may not deny an indigent defendant an adequate appellate review of a criminal conviction. *Griffin* v. *Illinois,* 351 U.S. 12. Such a denial was described as "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal justice." 351 U.S. p. 19. In *Griffin,* this court held that Illinois' refusal to furnish an indigent defendant with a free transcript deprived him of Fourteenth Amendment rights where a free transcript was virtually required for appellate review.

In three cases decided in the 1962 Term, *Lane* v. *Brown,* 372 U.S. 477, *Draper* v. *Washington,* 372 U.S. 487 and *Douglas* v. *California,* 372 U.S. 353, the rights of indigent defendants in state criminal cases to appointed counsel and free transcripts on appeal were notably expanded. In *Lane* v. *Brown,* the grant of transcripts by Indiana was conditioned on the request of a public defender. Since the decision of the public defender was not subject to review, it tainted the system. In *Draper* v. *Washington,* that state conditioned its grant of transcripts on the certification by the trial judge that the assignments of error were not "patently frivolous." This Court held that the Washington procedure did not afford defendants a record sufficiently

complete for appellate review and since defendants with funds received appellate review based on a full transcript, equal protection of the laws required Washington to give indigents a stenographic record "or its equivalent", 372 U.S. 497. Finally in *Douglas* v. *California,* the Court invalidated that state's procedure of sifting out appeals where counsel is required by allowing the district courts of appeal to deny counsel if after they have viewed the record, they conclude that such appointment would be of no value to either the defendant or the court.

In effect, these cases repeat the same theme—that special procedures intended to sort out frivolous appeals by indigents will survive only if they are the equivalent of the normal appellate review available to non-indigents.

B. As Applied by the Court of Appeals 28 U.S.C. 1915 Denies Indigents the Same Rights of Appeal as Are Afforded to Men of Means.

The basic statutory provision for litigation in forma pauperis in the federal courts is made by 28 U.S.C. 1915. The provisions of Sec. 1915 can be understood and applied only when read together with the other provisions of the Judicial Code and the Federal Rules governing criminal appeals. Present federal law makes an appeal from a district court in a criminal case a matter of right. 28 U.S.C. 1291. That is, a defendant has a right to have a final order of a district court reviewed by a court of appeals and need not petition that court for an exercise of its discretion to allow him to bring the case before the court. *Coppedge* v. *United States,* 369 U.S. 438.

The function of 28 U.S.C. 1915 has been described thus: ". . . [it] provides at most a device for advance screening

of appeals which, if paid, would upon motion be dismissed before argument as frivolous. The only justification for such a preliminary screening is the absence of the built-in brake upon frivolous appeals which is present in non-indigent cases. There is no other difference between paid and unpaid appeals. In both the burden of showing that the right to appeal has been abused is on the party making the suggestion." Justice Stewart, concurring in *Coppedge* v. *United States,* 369 U.S. 438 at p. 455.

This court has consistently held that 28 U.S.C. 1915 cannot be applied in a manner which would impinge upon the rights of an indigent defendant to have his fair day in court. In *Johnson* v. *United States,* 352 U.S. 565, this Court held that the district court's denial of a certificate of good faith cannot be used to bar further appeal in forma pauperis and the court of appeals must furnish one who challenges such a certificate with counsel and an adequate means of presenting the court of appeals with a fair basis for determination.

In *Ellis* v. *United States,* 356 U.S. 674, this court further refined the *Johnson* doctrine and required that appointed counsel not function as an amicus curiae but in the "role of an advocate". The court expressly held that the good faith test of the statute must not be converted into a requirement for a preliminary showing of merit. Again the theme of equality was repeated. "Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant * * * the request of an indigent for leave to appeal in forma pauperis must be allowed." 356 U.S. at p. 675.

Despite these foreshadowings, further elaboration of the applicable principles has been required. In *Coppedge* v.

United States, 369 U.S. 438, the Court sought to "indicate in somewhat greater detail than in the past, the approach a court of appeals must take toward an indigent's application for leave to take a direct appeal from his criminal conviction in forma pauperis." 369 U.S. 441. It held that the good faith requirement of 28 U.S.C. 1915 must be judged by an *objective* standard, i.e., that the issues themselves be "not clearly frivolous." Whether the issue is frivolous would in turn depend on whether at the same stage in the proceedings "the appeal would be dismissed in the case of a nonindigent litigant." 369 U.S. 447.

By this standard, the decision of the court of appeals is erroneous. Had the petitioner Nowakowski been a man of means, he would have simply filed a notice of appeal, paid the docketing fees, prepared and filed the record on appeal and his counsel would have filed a brief. Only then, after a motion to dismiss, and after consideration of an advocate's brief and probably after oral argument, would his appeal be dismissed.[1]

Herein is the true vice of the court of appeals' procedure seen. Without a full record,[2] without the benefit of appel-

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[1] Rule 11 of the Rules of the United States Court of Appeals for the Third Circuit makes applicable to criminal appeals the provisions of Rules 37 and 39 of the Federal Rules of Criminal Procedure. Rule 39(a) provides "The appellate court may at any time entertain a motion to dismiss the appeal". Rule 30 of the Court of Appeals' Rules provides that all motions shall be reduced to writing and five days notice of motion will be furnished. On the return day, fifteen minutes is allowed each side for argument. Counsel do on occasion submit their cases on memoranda without oral argument.

[2] It is significant that there was not included in the record certified to the United States Supreme Court, the transcript of the original trial. This transcript had been marked into evidence at the habeas corpus hearing (R. 62), and would appear to be the indispensable tool for determining the effectiveness of trial counsel.

late briefs and without oral argument it has finally terminated petitioner's rights to a federal appellate review of a claim of a constitutional right. The stark reality of the difference between the treatment a non-indigent gets as opposed to an indigent, may be seen on the letter of the Clerk of the Third Circuit Court addressed to petitioner on November 5, 1965, wherein he was advised that he could proceed in the court of appeals if he would send the clerk $25.00 and four copies of a motion to docket and file the record out of time. (App. 31).

How important is that right to federal appellate review was seen only last term in the case of *Sheppard* v. *Maxwell*, 384 U.S. 333, where this court reinstated the decision of a lower federal court on habeas corpus upholding a claim of deprivation of a constitutional right which had been rejected by every state court in Ohio and by this court on certiorari. One federal district judge took the time to review the *Sheppard* case. Only this month a jury in Ohio on a new trial governed by constitutional standards acquitted Doctor Sheppard.[3] He had the good fortune throughout to have his case briefed and argued by retained counsel. We can only surmise as to where he would be today if he had been an indigent.

If it be suggested that the principles and rationale of *Coppedge, Ellis* and *Johnson* apply only to direct appeals in the federal courts from federal convictions and not in cases of collateral attack under either 28 U.S.C. 2255 or 28 U.S.C. 2241 et seq., the argument should be rejected. In reviewing state court procedures, this court has held that the *Griffin* rationale applies as well to state post-conviction remedies, as to direct appeals. *Burns* v. *Ohio*, 360 U.S. 252;

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[3] New York Times, Nov. 17, 1966, p. 1.

Smith v. *Bennett,* 365 U.S. 708; *Rinaldi* v. *Yeager,* 384 U.S. 305. No less should be expected of the federal system.

Any other holding would raise a doubt as to the constitutionality of 28 U.S.C. 1915. This court has consistently relied upon its supervisory powers over the administration of federal justice to sustain its prior holdings but has always pointed out that it has been "impelled by considerations beyond the corners of 28 U.S.C. § 1915." *Coppedge* v. *United States,* 369 U.S. 438 at p. 445. In *Hardy* v. *United States,* 375 U.S. 277, 282, the court said "[w]e deal here only with the statutory scheme and do not reach a consideration of constitutional requirements." It would be a novel suggestion that less stringent requirements would be exacted under the Fifth or Sixth Amendments than the Fourteenth Amendment, although such distinctions may in some uses be made. *Reynolds* v. *Sims,* 377 U.S. 533. Nonetheless, the mandate of this court has been clear, to assure equal justice for all.

While it once may have been argued that petitioner's interpretation places an undue economic burden upon the federal government, *Hardy* v. *United States,* 375 U.S. 277, 300, it now appears that Congress is willing to bear that burden. The Criminal Justice Act of 1964[4] now provides an effective means for compensating counsel in indigent cases. The purpose of the House bill was, simply stated, "to provide legal assistance for indigent defendants in criminal cases in the courts of the United States." H.R. Rep. No. 864, 88th Cong., 1st Sess (1963). The bill provides for representation

[4] 18 U.S.C. 3006A, *infra* (App. 42).

of indigent defendants who are "financially unable to obtain counsel" and further conditions any plan upon its having "provisions for the representation on appeal of defendants financially unable to obtain representation."

While the language of the bill does not by its terms directly encompass habeas corpus proceedings brought under 28 U.S.C. 2241 et seq., no reason appears why it should not be so applied. It would apply in a 2255 proceeding since counsel is guaranteed at "every stage of the proceeding . . . through appeal." Given the legislative history of the bill and that "the time has come for a comprehensive overhauling of the procedures governing in forma pauperis appeals in the federal system", *Hardy* v. *United States*, 375 U.S. 277, 299, no less of an intent could be attributed to the Congress. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).

Thus, whatever may have been the reluctance of inferior federal courts to assign counsel in collateral attack cases in the past, *Crowe* v. *United States*, 175 F.2d 799, (4th Cir. 1949) certiorari denied, 338 U.S. 950; *Tubbs* v. *United States*, 249 F.2d 37 (10th Cir. 1957), certiorari denied 355 U.S. 935; *United States* v. *Paglia*, 190 F.2d 445 (2d Cir. 1951), Comment, Right to Counsel in Federal Collateral Attack Proceedings; Section 2255, 30 U. Chi. L. Rev. 583 (1963), that reluctance should now be diminished.[5] The Congress of the United States have adopted as a national policy the message of the late President Kennedy urging

[5] Counsel acknowledges the kind assistance of Bennett Boskey, Esq. of the District of Columbia Bar and the use of materials contained in Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Min. L. Rev. 783 (1961).

upon the House the passage of the Criminal Justice Act as a means of "removing the factor of financial resources from the balance of justice." H.R. Rep. No. 864, 88th Cong., 1st Sess. (1963). It has been said that "the methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Mr. Chief Justice Warren speaking in *Coppedge v. United States,* 369 U.S. 438, 449. Surely the nation which Providence has endowed with the greatest wealth in history can afford to give a poor man one full and fair federal review of a claim of right arising under the Constitution of the United States.

II.

The Issues Raised by Petitioner Could Not Properly Be Determined to Be Frivolous Without Further Briefing and Oral Argument, in View of the Fact That the District Court Had Already Issued a Certificate of Probable Cause.

In his petition for habeas corpus the petitioner's Amendment to Petition dated January 6, 1965, placed in issue before the district court substantially only one question, whether petitioner had been denied the effective aid and assistance of counsel guaranteed by the Sixth Amendment as made applicable by the Fourteenth Amendment to the United States Constitution.

A. The Claim of Denial by a State of the Effective Assistance of Counsel Can Properly Be Raised in a Federal Habeas Corpus Proceeding Under 28 U.S.C. 2241.

Since *Powell* v. *Alabama,* 287 U.S. 45 (1932), it has been held that where a man is entitled to counsel he is entitled

to the "effective assistance of counsel". In *Avery* v. *Alabama,* 308 U.S. 444 the Court speaking through Mr. Justice Black referred to a constitutional requirement of "due appointment of competent counsel" which "cannot be satisfied by mere formal appointment." In *White* v. *Ragen,* 324 U.S. 760 the Court held that allegations that petitioner's appointed counsel failed to confer with him until they arrived at court, failed to call a witness on his behalf and made him plead guilty, were sufficient to make a prima facie case of violation of petitioner's constitutional right to "the effective aid and assistance of counsel".

It is now settled that every state court defendant in a felony case has a constitutional right to counsel, *Gideon* v. *Wainwright,* 372 U.S. 335. There remains for determination the character and quality of representation guaranteed by the Constitution. Suffice it to say for present purposes that petitioner was entitled to the "effective assistance of counsel". It was this question which he sought to raise in a federal habeas corpus proceeding under 28 U.S.C. 2241 et seq. This use of federal habeas corpus as a procedural device for raising the issue of ineffective trial representation was not questioned. *Fay* v. *Noia,* 372 U.S. 391, *Chessman* v. *Teets,* 354 U.S. 156. The sole question was whether his counsel had been effective.

B. The Question of Effective Aid of Counsel Raised by Petitioner Was Not Frivolous Since It Was Based Upon Objective Factors Not a Matter of Trial Tactics.

While the question may be simply stated, it is not simply answered. Most of the claims of ineffective counsel turn upon arguments that counsel used poor judgment or poor tactics in the course of a trial. "As lawyers we are not

unaware of the general tendency of unsuccessful litigants to blame their counsel for their misfortune". *Desmond* v. *United States,* 333 F.2d 378, 381, 382 (1st Cir. 1964). While no single word or group of words can furnish an exact formula for decision, certain objective criteria have developed whereby such claims may be judged.

A case by case analysis has been made of the various factors which alone, or in combination will impel the conclusion that counsel has been ineffective. *Waltz, Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases,* 59 Northwestern Univ. L. Rev. 289 (1964). Among the factors to be considered are:

1. Youth and inexperience of trial defense counsel contributed to the errors set forth below.

While the mere fact that counsel is young and inexperienced does not of itself furnish grounds for post-conviction relief it is undoubtedly a factor to be considered. *Spaulding* v. *United States,* 279 F2d. 65 (9th Cir. 1959), certiorari denied, 364 U.S. 887, *People* v. *Riley,* 376 Ill. 364, 33 N. E. 2d 872, certiorari denied 313 U.S. 586, *McKenna* v. *Ellis,* 280 F2d 592 (5th Cir. 1960). In the case at bar, petitioner's court appointed counsel stated that he had never tried a civil jury trial (R. 74) and was uncertain as to whether he had ever tried a criminal jury trial. (R. 74) While this does not necessarily reflect on the court appointed counsel's efforts, it surely had an effect on his ability to handle the difficult evidentiary questions raised at the trial. Some of the trial errors alleged in the habeas corpus proceeding were:

(a) *Failure to object to the state's impeachment of its own witness.*

The principal witness for the state was the alleged accomplice, Douglas Smith. When he was put on the stand he denied any participation in the crime and exculpated the petitioner Nowakowski (R. 61). Thereupon, without objection, he was permitted to be removed from the court room and taken into an adjoining court room and was later returned to the stand and invoked the privilege against self-incrimination. (R. 64). He was thereupon impeached by the State. (R. 66, 67). No objection was made by court appointed counsel to these bizarre proceedings. Indeed, "[t]here was not one objection in the whole trial record." (R. 72)

Under Pennsylvania law, the State had no inherent right to impeach its own witness. Impeachment is within the discretion of the trial judge. A proper groundwork must be laid and before impeachment is allowed, the party calling the witness must first show (1) That he has been genuinely surprised (2) that he had a right to rely on the prior statement and (3) that he had some kind of representation by the witness so that he was induced to call him. *Commonwealth* v. *Smith,* 178 Pa.Super. 251, 115 A.2d 782 (1955); *Selden* v. *Metropolitan Life Ins. Co.,* 157 Pa. Super. 500, 43 A.2d 571 (1945).

Until such a foundation had been laid, defense counsel could have properly objected to the impeachment of the State's witness and to the unusual conduct concerning the conference between the court and Smith's counsel (R. 61), especially in view of the fact that Smith had already pleaded guilty and was awaiting sentence. (R. 61). Subsequently,

Smith was convicted of perjury and sentenced therefor to two to five years. The question is when did he perjure himself—before the Alderman's Court or before the County Court.

(b) *Failure to request cautionary instructions as to the witnesses who impeached Smith.*

Even if the trial court was correct in allowing the impeachment of Smith, the best the State could do thereafter was to neutralize his testimony. It is the settled law of Pennsylvania, that if impeachment of a hostile witness is allowed, the evidence of prior inconsistent statements is only admissible for the purpose of impeaching the witness, that is to indicate to the jury that his present testimony should be disbelieved because he has told prior conflicting stories. Its purpose is not affirmative proof of the facts set forth in the prior statement. *Commonwealth* v. *Turza*, 340 Pa. 128, 16 A.2d 401 (1940); *Commonwealth* v. *Smith*, 178 Pa. Super. 251, 115 A.2d 782 (1955). Despite this, two police officers were permitted to testify without objection as to the prior statement of Smith incriminating petitioner. (R. 72). Not only was no objection then made but no request was made for instructions limiting their testimony to impeachment purposes (R. 72). The net result was that the only direct evidence of petitioner's guilt was obtained by using the inadmissible testimony of the police officers.

It can be said with safety that petitioner's trial counsel was candid. The colloquy at the habeas corpus hearing was:

> "Q. If the testimony of Officer Tribble was for impeachment purposes, was not it reversible error for the Judge not to instruct upon it?

A. I have no recollection of the testimony. Also, I wouldn't know." (R. 67)

The same point had been raised and lost in *Commonwealth* v. *Smith,* 178 Pa. Super. 251, 115 A.2d 782 (1955), when defense counsel failed to raise it. The court said "since he failed to object, and in fact consented to the introduction, without any explanation, the question is academic here." 115 A.2d 786. If appointed counsel had been familiar with *Commonwealth* v. *Smith,* he might have gotten a directed verdict for petitioner.

(c) *Failure to request special instructions as to a conviction based on the testimony of an accomplice.*

While the record before us does not contain the transcript of the trial judge's charge, no reference appears to have been made at the trial as to the need for corroboration of the Smith testimony. One who testifies while faced with criminal charges as Smith was in the Alderman's Court may be influenced to testify falsely by the hope of leniency and the defendant is entitled to have the jury so advised. *Commonwealth* v. *Brown,* 158 Pa. Super. 226, 44 A.2d 524 (1945). In addition to the need for scanning an accomplice's testimony, corroboration is required. Ordinarily the exact form of instruction should be left to the trial judge, *Commonwealth* v. *McKenna,* 206 Pa. Super. 317, 213 A.2d 223 (1965), but an instruction should be given.

(d) *Failure to advise about the privilege against self-incrimination.*

While it is no doubt true that petitioner would have had to take the stand at trial since his defense was an alibi, at

least petitioner should have been advised not to volunteer that "he was an ex-convict and on parole". (R. 68) The practice in Pennsylvania is that if a defendant takes the stand in his own defense, the Commonwealth may offer evidence of prior convictions and guilty pleas to affect credibility. The proper practice is to have the prosecutor read into evidence the original bills of indictment, guilty pleas and convictions. *Commonwealth* v. *Johnson*, 206 Pa. Super. 147, 211 A.2d 100 (1965); *Commonwealth* v. *Butler*, 405 Pa. 36, 173 A.2d 468 (1961). There was surely no need for petitioner to say he was on parole even if assigned counsel thought it prudent to disclose his record on direct examination.

(e) *Failure to object to evidence of an offer of compromise.*

At the criminal trial, the proprietor of the Green Garden Tavern was permitted to testify without objection to the receipt of a letter from petitioner wherein he offered without prejudice to pay for the damages sustained at the Tavern (R. 63). While no Pennsylvania case has been disclosed bearing directly on the admissibility of such a letter in a criminal case, every practicing lawyer is familiar with the general proposition that an offer to compromise a dispute is not admissible in evidence to prove that the sum offered was admitted to be due. *Mannella* v. *City of Pittsburgh*, 334 Pa. 396, 6 A.2d 70 (1939). Especially is this so where the offer is expressly stated to be "without prejudice". *Jones* v. *Steinberg*, 178 Pa. Super. 517, 115 A.2d 803 (1955); *Rankin* v. *Phillippe*, 206 Pa. Super. 27, 211 A.2d 56 (1965).

A fortiori, assigned counsel should have objected to the offering of evidence of this compromise. It appeared that

in the same letter petitioner "stated he was not guilty of it, but he wanted to avoid going to trial, so forth." (R. 63). Every lawyer has, at some time, suggested a like offer to a client faced with compromising circumstances. That should not be turned into an admission of guilt.

Concededly, none of the foregoing trial decisions by assigned counsel would justify a reversal [redacted] together they form a picture of inexperience that may have been detrimental to petitioner.

2. Inadequate Pretrial Investigation as a result of delayed appointment of counsel precluded the effective assistance of counsel.

Whatever may be the reluctance of courts to make a value judgment as to the intrinsic effectiveness of trial counsel, they have been quick to vindicate a claim of denial of the effective assistance of counsel where it is shown that the appointment came so late as to preclude an adequate pretrial investigation. Chief Judge Biggs of the Third Circuit whose decision we are reviewing has made this point amply clear. In *United States* v. *Helwig*, 159 F.2d 616 (3rd Cir. 1947), where the clerk's minutes indicated that counsel was appointed only a minute before trial, he said:

"We are of the opinion that counsel for an indigent defendant held in custody, must be appointed by the court sufficiently far in advance of trial to enable counsel adequately to prepare the defense." 159 F.2d 616, 618. In *United States* v. *Vasilich*, 206 F. Supp. 195 (M.D. Pa. 1962) counsel had been appointed at 1:30 and the trial commenced at 2:00 over counsel's objection. The charge was robbery and the defenses alibi and mistaken identity. Vasilich was awarded a new trial 20 years after his original trial.

While those were extreme cases, the principle is sound. Here the petitioner swears that he never saw his assigned counsel until the morning of the trial (R. 85), and assigned counsel thinks he only saw his client before that because he had a note in his diary. (R. 75). However, the official court records (App. 33) disclose that counsel was assigned to the co-defendant Smith on August 29, 1957 but there is no order of court ever appointing counsel for Nowakowski. Also, petitioner's court appointed counsel did not enter his appearance until the very day of the trial. A copy of the actual appearance is found in the Appendix to Petitioner's Brief. (App. 32)

Powell v. *Alabama,* 287 U.S. 45 early held that effective representation requires adequate consultation and investigation. *Cf. Glasser* v. *United States,* 315 U.S. 60. In the case at bar petitioner's assigned counsel admitted freely that he had not interviewed or attempted to interview the police officer who investigated the case (R. 62), had not discussed the case with the prosecution witnesses (R. 62) (it is questionable if he could have done this), had not examined the pretrial statement of Smith (R. 65), had not interviewed his client's alibi witness (R. 65) and had not asked the Sheriff's office of Erie County to serve a subpoena on the alibi witness until the end of the first day of trial. (R. 70). He did say that he had spoken to her on the telephone but did not elaborate on the conversation (R. 70).

Taken in the whole this was not adequate preparation for the trial of a felony case. This point is urged without criticism of assigned counsel since it is apparent that the limitations on his ability were imposed by the circumstances of his late appointment. These limitations were particularly striking in this case because the presence of the alibi wit-

ness was so important. The irony of the case is that this same witness was not produced again at the habeas corpus hearing because of a mixup in the subpoena (R. 90). Just once, it would be interesting to hear her testimony.

In view of these serious questions as to the effectiveness of trial counsel, it cannot fairly be said that the questions raised by petitioner were frivolous. They may not eventually be sustained but surely he deserves the right to be heard on them.

C. Since the District Court Had Already Issued a Certificate of Good Faith, the Court of Appeals Should Have Granted Petitioner Leave to Appeal in Forma Pauperis as a Matter of Right.

The disturbing aspect of this case is the manner in which the court of appeals summarily disregarded the trial judge's certificate of good faith. Section 1915 of Title 28 U.S.C. authorizes the prosecution *inter alia* of an appeal by an indigent person without prepayment of costs or fees. The only condition is that an "appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." On motion of petitioner, the trial judge certified that the petitioner "has probable cause for appeal." (R. 129). In the converse situation where the trial judge's certificate is unfavorable this Court has said that the "District Court's certificate is not conclusive although it is, of course, entitled to weight", *Coppedge* v. *United States,* 369 U. S. 438, 446; *Johnson* v. *United States,* 352 U.S. 565. In such cases this court has held that a petitioner who contests a certificate is entitled to counsel. Surely an indigent petitioner is no less entitled to counsel to sustain a certificate of probable cause. By a process of inverse

logic, the court of appeals has simplified the procedure for handling indigent appeals. This court should not permit *Coppedge* to be thus vitiated.

Because the issue of ineffective counsel was properly raised in the habeas corpus proceeding and because the issues were genuine and not frivolous as to the experience, ability and pretrial preparation of assigned counsel and because the very trial judge who had entertained the habeas corpus hearing found there was probable cause for the appeal, the court of appeals abused its discretion in denying petitioner leave to appeal in forma pauperis without affording him the right to be heard with the aid of counsel.

Conclusion

For the reasons stated the orders of the court of appeals should be reversed and the case remanded to that court with instructions that petitioner be given leave to appeal in forma pauperis, be given a record of sufficient completeness to enable him to perfect his appeal and be assigned counsel in that court to assist him in presenting the case to the court.

Respectfully submitted,

DANIEL J. O'HERN
Attorney for Petitioner

November, 1966.

APPENDIX

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
U. S. COURTHOUSE
PHILADELPHIA 19107

IDA O. CRESKOFF
CLERK

TELEPHONE
215-597-2995

November 5, 1965

Edward J. Nowakowski, No. C-7409
State Correctional Institution
P. O. Box 9901
Pittsburgh, Pa. 15233

Re: U.S. ex rel. Nowakowski, petitioner,
vs. Maroney, Supt., etc.
C. A. Misc. Record No. 199

Dear Sir:

This will acknowledge receipt of your letter of November 1, 1965.

By order of July 27, 1965 the Court of Appeals denied your petition to prosecute your appeal in forma pauperis. By order of October 4, 1965 the Court denied your motion for reconsideration.

You may choose either of the following alternatives:

(1) Send this office the Clerk's fees of $25.00, together with 4 copies of a motion to docket the appeal and file the record out of time, or

(2) Petition the Supreme Court of the United States for a writ of certiorari.

If you choose (2) advise this office and we will then let you know what the cost will be to certify the proceedings in this court to file with your petition for writ of certiorari in the Supreme Court.

Very truly yours,

Clerk

fm

Clerk of Courts Form No. 5

IN THE COURT OF QUARTER SESSIONS
OF ERIE COUNTY, PENNSYLVANIA
No. 10 SEPTEMBER Sessions, 1957

COMMONWEALTH

vs.

EDWARD JOHN NOWAKOWSKI

I Appear for Defendant, EDWARD JOHN NOWAKOWSKI, in above stated case.

/s/ THOMAS C. MANGAN
Att'y for Defendant

To GEORGE L. WILSON, Clerk of Courts
Dated SEPTEMBER 11th, 1957

IN THE COURT OF QUARTER SESSIONS AND OYER AND TERMINER IN AND FOR THE COUNTY OF ERIE, PENNSYLVANIA

No. 10 SEPTEMBER SESSIONS, 1957.

COMMONWEALTH OF PENNSYLVANIA

VS.

JOSEPH CORCORAN,
DOUGLAS E. SMITH,
EDWARD JOHN NOWAKOWSKI.

QUARTER SESSIONS DOCKET ENTRIES

1st Count: BURGLARY.
2nd Count: LARCENY.
3rd Count: RECEIVING STOLEN GOODS.

C. A. TRIBBLE, PROS.
JAIL

Upon Petition of Henry Corcoran, the Father of Joseph Corcoran, the Minor Defendant above-named, by his counsel, Edward G. Petrillo, Esquire, asking the Court to fix Bail for the said Defendant, Joseph Corcoran, the following Order of Court was made:

AND NOW, to-wit, this 18th day of July, 1957, Bail in the above-entitled case is fixed in the amount of $1,000.00.

Per Curiam Laub, Judge.

July 18th, 1957, Bond of the Defendant, Joseph Corcoran, in the sum of One Thousand ($1,000.00) Dollars with Henry Corcoran as surety for appearance on the Second Monday of September, 1957, filed showing the following Order of Court:

July 18th, 1957, Bond Approved.

Burton R. Laub, JUDGE.

August 28th, 1957, A True Bill.

And now, to-wit, the 29th day of August, 1957, comes Herbert J. Johnson, Jr., District Attorney, who has been informed that the above named defendant is indigent, and respectfully requests your Honorable Court to appoint counsel to represent the said defendant. The above stated indigent defendant is charged with the crime of Burglary.

(Signed) Herbert J. Johnson, Jr.
District Attorney

And now, to-wit, the 29th day of August, 1957, motion granted and Walter A. Dart, Jr., Esq., is hereby appointed as counsel for the defendant in the above-entitled case.

Samuel Y. Rossiter
J.

(The Above Motion and Order Applies to the Defendant, Douglas E. Smith)

September 10th, 1957, Certified into the Court of Oyer and Terminer as to Douglas E. Smith.

September 11th, 1957, Certified into the Court of Oyer and Terminer as to Edward John Nowakowski.

(See Oyer and Terminer Docket No. 8—Page 271)

Oyer and Terminer Docket Entries

August 28th, 1957, A True Bill.

September 10th, 1957, Certified into the Court of Oyer and Terminer as to Douglas E. Smith.

September 10th, 1957, the Defendant, Douglas E. Smith, appears in Court with his Counsel, Walter A. Dart.

September 10th, 1957, Appearance for the Defendant, Douglas E. Smith, filed by Walter A. Dart, Attorney.

And now, to-wit: Sept. 10 A.D. 1957 the Defendant Douglas Smith being arraigned, plead Guilty, before,

Elmer L. Evans, President Judge.

And Now, September 10th, 1957, Sentence as to the Defendant, Douglas E. Smith, is deferred until Monday, September 16th, 1957, at 10:00 o'clock A.M. and said Defendant is remanded to the Jail of Erie County.

Elmer L. Evans, President Judge

September 11th, 1957, Certified into the Court of Oyer and Terminer as to Edward John Nowakowski.

September 11th, 1957, the Defendant, Edward John Nowakowski, appears in Court with his Counsel, Thomas C. Mangan.

September 11th, 1957, Appearance for the Defendant, Edward John Nowakowski, filed by Thomas C. Mangan, Attorney.

September 11th, 1957, Case called, Honorable Samuel Y. Rossiter, Judge, on the Bench, and the Defendant, Edward John Nowakowski, present in Court with his Counsel, Thomas C. Mangan. The Defendant, Edward John Nowakowski, being arraigned, pleaded Not Guilty; same day, the Defendant, Edward John Nowakawski, consulted and assisted his Counsel in selecting the following Jury: George J. Winnen, Earl Martin, Frank J. Stroker, Mrs. Marie Barron, Martin L. Connell, Joseph D. Pault, Carl R. King, James Cooper, Mildred M. Auerbach, Harold Cotton, Joseph Zipper and Kathryn Graves. The selection of the Jury having been completed, the Jury was sworn and the case assigned to Honorable Samuel J. Roberts, President Judge, Orphans' Court, Specially Presiding, for trial.

September 11th, 1957, Case called for trial with Honorable Samuel J. Roberts, President Judge, Orphans' Court, Specially Presiding, on the Bench, and the Defendant, Edward John Nowakowski, present in Court with his Counsel, Thomas C. Mangan.

September 12th, 1957, the Defendant, Edward John Nowakowski, being present in Court with his Counsel, Thomas C. Mangan, and having been present during the

entire proceedings of the trial, the Jury say They Find the Defendant Edward John Nowakowski Guilty.

September 12th, 1957, Thomas C. Mangan, Attorney for the Defendant, Edward John Nowakowski, requesting that the Jury be polled and the Jury being severally called, severally say, that they find the Defendant, Edward John Nowakowski, Guilty.

And Now, September 12th, 1957, After verdict, sentence as to the Defendant, Edward John Nowakowski, is deferred until Monday, September 16th, 1957, and said Defendant is remanded to the Jail of Erie County.

Samuel J. Roberts, President Judge,
Orphans' Court, Specially Presiding

September 16th, 1957, the Defendant, Edward John Nowakowski, appears in Court with his Counsel, Thomas C. Mangan.

And now, September 16th, 1957, the Court sentences the defendant Edward John Nowakowski to pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Three (3) Years, and the maximum Seven (7) Years, to be computed from the date of commitment, to-wit: July 14th, 1957, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Edward John Nowakowski, is ordered committed to the Western Correctional Diagnostic and Classification Center at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

Samuel J. Roberts, President Judge,
Orphans' Court, Specially Presiding

September 23rd, 1957, Testimony filed.

September 23rd, 1957, Certified copy of the Testimony given to John L. Coates, Sheriff, for delivery by him to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary.

November 20th, 1957, the Defendant, Douglas E. Smith, appears in Court with his Counsel, Walter A. Dart.

And now, November 20th, 1957, the Court sentences the defendant, Douglas E. Smith, to pay a fine of One Hundred ($100.00) dollars, to the Commonwealth, (for the use of the County of Erie), pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in a state institution, for an indefinite term, the minimum of which shall be Three (3) Years and the maximum Eight (8) Years, to be computed from the date of commitment, to-wit: July 14th, 1957, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

The defendant, Douglas E. Smith, is ordered committed to the WESTERN CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER at the Western Penitentiary, Allegheny County, Pennsylvania, for compliance with the above sentence.

Elmer L. Evans, PRESIDENT JUDGE.

March 26th, 1958, Petition For Forma Pauperis requesting records filed by the defendant, Edward John Nowakowski.

ORDER

And now, to wit, March 25, 1958, pursuant to the within petition, the Clerk of Courts is directed to forward to the defendant copies of such of the papers requested as are on file in his office, with the exception of the testimony which perhaps can be made available to the defendant by the

Warden of the Penitentiary. The papers shall be supplied at the expense of the County.

Samuel J. Roberts, P.J.
Orphans' Court, Specially Presiding.

April 1st, 1958, Mailed to Edward John Nowakowski at the Western Penitentiary, Certified copy of the Docket Entries, Indictment, Appearance of Attorney, Verdict of the Jury, Order of September 12, 1957 and Sentence of the Court in this case.

MOTION IN ARREST OF JUDGMENT

To; The Honorable the Judges of said Court:

Comes now the Defendant, Edward Nowakowski, who respectfully represents the following:

1. On Sept. 12, 1957 the defendant was convicted of Burglary, Larceny and Receiving Stolen Goods and sentenced to serve 3 to 7 years at the Western State Penitentiary. 2. Defendant had a court appointed attorney who was so overawed, inexperienced or incompetent that he failed to properly represent petitioner and failed to prepare and present his defense at trial. 3. The legally competent evidence presented was not sufficient to permit the case to go to the jury. 4. The verdict of the jury was contrary to the weight of the evidence and is inconsistent. Wherefore, the defendant Edward Nowakowski, respectfully prays your Honorable Court to grant this Motion in Arrest of Judgment and he will ever pray.

(SIGNED) Edward John Nowakowski
PETITIONER

MOTION FOR NEW TRIAL

To: The Honorable, the Judges of the said Court:

Comes now the Defendant, Edward Nowakowski, who respectfully represents the following:

1. Paragraphs 1 through 4 of the aforesaid motion in Arrest of Judgment are incorporated by reference herein. 5. The defendant did not receive a reasonable time to prepare his defense, an opportunity to subpoena witnesses, nor counsel able, willing and competent to undertake and prepare his defense. 6. One of the Commonwealth's witnesses was permitted to converse with the jury during the course of the trial. 7. The Court failed to comment on defendant counsel's handling of the case or to note the jury that Commonwealth's case rested solely on hearsay, legally incompetent, evidence. 8. The Court when co-defendant repudiated his statement on the stand and absolved the defendant, granted a recess and permitted the Commonwealth to remove the said defendant from the courtroom before his testimony on direct examination was completed. Wherefore your petitioner Edward Nowakowski, the defendant, respectfully prays that your Honorable Courts grant this motion for a new trial.

(SIGNED) Edward John Nowakowski
PETITIONER

Affidavit of Forma Pauperis filed by Edward John Nowakowski, Petitioner, attached to Motion for Arrest of Judgment and Motion for New Trial and filed.

ORDER

And now, to wit, November 13, 1959, the motion in arrest of judgment and the motion for new trial are refused.

Samuel J. Roberts, P. J.
Orphans' Court, Specially Presiding.

November 16th, 1959, Copy of Order of November 13, 1959, mailed to Edward John Nowakowski at the Western Penitentiary, Pittsburgh 33, Penna.

Clerk of Courts Form No. 7

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ERIE, *ss.*

I, GEORGE L. WILSON, Clerk of the Court of Quarter Sessions and Oyer and Terminer in and for the County of Erie, Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true photostatic copy of the Appearance of Counsel and Docket Entries in the case of the COMMONWEALTH OF PENNSYLVANIA VS. EDWARD JOHN NOWAKOWSKI as appears by the record in my office in said case, No. 10 SEPTEMBER Sessions, 1957.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court at Erie, this 1st day of June A. D. 1965.

/s/ GEORGE L. WILSON
Clerk of Court of Quarter Sessions
and Oyer and Terminer

(Seal)

(Emblem)

GEORGE L. WILSON
CLERK OF COURTS
ERIE, PA.

October 24, 1958

Mr. Edward Nowakowski No. C-3955
P. O. Box 9901
Pittsburgh 33, Pennsylvania

Dear Mr. Nowakowski:

Douglas E. Smith pleaded Guilty to a charge of Perjury under Indictment No. 135 November Sessions, 1957.

This charge was brought against him because of the fact that he testified under oath during the trial at No. 10 September Sessions, 1957, in the Court of Oyer and Terminer that they, the said Douglas E. Smith and Edward John Nowakowski, had not burglarized one Green Garden Tavern at 8th and Greengarden, in the City of Erie, County of Erie and State of Pennsylvania on or about the 13th day of July, 1957, whereas, in truth and fact, he, the said Douglas E. Smith had previously on the 18th day of July, 1957, testified under oath in a judicial proceeding before Alderman Michael J. Kinecki of the Second Ward of the City of Erie, that they, the said Douglas E. Smith and Edward John Nowakowski, had burglarized the said Green Garden Tavern on or about the 13th day of July, 1957.

On November 20th, 1957, Douglas E. Smith was sentenced under this charge of Perjury to serve Two (2) Years to Five (5) Years in a state institution, said sentence to run consecutively with the sentence imposed under No. 10, September Sessions, 1957.

Very truly yours,

/s/ GEORGE L. WILSON
George L. Wilson
Clerk of Courts

GLW/ebw

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. 3006A provides:

§ 3006A. Adequate representation of defendants

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors, other than petty offenses as defined in section 1 of this title, who are financially unable to obtain an adequate defense. Representation under each plan shall include counsel and investigative, expert, and other services necessary to an adequate defense. The provision for counsel under each plan shall conform to one of the following:

(1) Representation by private attorneys;

(2) Representation by attorneys furnished by a bar association or a legal aid agency; or

(3) Representation according to a plan containing a combination of the foregoing.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for the representation on appeal of defendants financially unable to obtain representation. Consistent with the provisions of this section, the district court may modify a plan at any time with the approval of the judicial council of the circuit; it shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of modifications in its plan.

(b) Appointment of counsel.—In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent

him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

(c) Duration and substitution of appointments.—A defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner or court through appeal. If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, he may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he had retained, the court may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States commissioner or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation.—An attorney appointed pursuant to this section, or a bar association or legal aid agency which made an attorney available for appointment, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court or before a United

States commissioner, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States commissioner or that court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States commissioner or court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney, bar association or legal aid agency. For representation of a defendant before the United States commissioner and the district court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall not exceed $500 in a case in which one or more felonies are charged, and $300 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the chief judge of the circuit. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association or legal aid agency for the services of an attorney, shall in no event exceed $500 in a felony case and $300 in a case involving only misdemeanors. * * *

SUPREME COURT, U. S.

FEB 16 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,
Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
STATE CORRECTIONAL INSTITUTION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

LINDLEY R. McCLELLAND,
District Attorney of Erie County, Pennsylvania,

WILLIAM E. PFADT,
Assistant District Attorney of Erie County, Pennsylvania,

Attorneys for the Commonwealth of Pennsylvania.

Erie County Court House,
Erie, Pennsylvania.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5033 CARLTON DRIVE, PITTSBURGH, PA., 15236
412-881-7463

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IN THE

Supreme Court of the United States

October Term, 1966

No. 222

EDWARD JOHN NOWAKOWSKI,

Petitioner,

vs.

JAMES F. MARONEY, Superintendent,
STATE CORRECTIONAL INSTITUTION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

Opinion Below

The orders of the Court of Appeals for the Third Circuit are not reported but appear as part of the Record (R. 135, 140). The prior opinion of the District Court for the Western District of Pennsylvania also appears in the Record (R. 115).

Jurisdiction

The order of the Court of Appeals for the Third Circuit was entered on October 4, 1965 (R. 140). A petition for

writ of certiorari was filed on January 4, 1966, and was granted on June 13, 1966 (R. 141; ___ U. S. ___). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Counter Statements of Questions Presented

1. Whether on application for leave to appeal *in forma pauperis*, the Court of Appeals could deny a criminal defendant leave to appeal *in forma pauperis* and refuse to appoint counsel even though the District Court Judge had issued a certificate of probable cause, without abusing the discretion vested in it under Section 1915 of Title 28 U. S. C.

2. Whether the Court of Appeals acted with good cause and with sound discretion in determining that the questions presented in collateral attack proceedings were so frivolous as to justify a denial of defendant's petitions without assignment of counsel or hearing.

Statute Involved

Section 1915 of Title 28 U. S. C. is the pertinent statute involved in this case. Particularly, subsection (d) is most relevant. This subsection provides:

(a) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Statement

I. History

Edward John Nowakowski, then age 27, was arrested on July 13, 1957, charged with burglary of a tavern in the City of Erie, which had occurred the night before. At a

preliminary hearing before an Alderman, his accomplice, Douglas Smith, pleaded guilty and testified against Nowakowski. Nowakowski was lodged in the Erie County Jail until the date of trial, September 11th and 12th, 1957. The record does not show that he was deprived of his rights to have visitors or to write letters. Counsel was appointed for this man, at his request, some time before the date of trial and counsel interviewed the defendant and prepared his defense, this despite the fact that counsel did not enter his appearance on behalf of defendant until the date of trial, September 11, 1957.

At the trial, Douglas Smith, the accomplice, changed his story and testified that Nowakowski did not commit the crime of burglary. Nowakowski was convicted and sentenced on September 16, 1957 to serve a term of 3 to 7 years for the crime of Burglary, Larceny and Receiving Stolen Goods. At the time of this offense Nowakowski was on parole because of a prior crime and the balance of that parole time had to be served before the sentence imposed on September 16, 1957 would begin.

While confined in the Erie County Jail awaiting transfer to the Western Diagnostic and Classification Center. Nowakowski escaped from the County Jail on September 19, 1957. He was returned from the escape on February 11, 1958 and sentenced by the Court of Quarter Sessions of Erie County at No. 74 February Sessions, 1958 to serve a term of 4 to 10 years for Prison Breach.

On February 12, 1958, Nowakowski was received into the Western Diagnostic and Classification Center to begin serving back-time as a parole violator. The sentences imposed by the Erie County Court were entered on the record as detainers, consecutive with each other according to the

terms set down by the Court, and to follow his back-time for parole violation.

Back-time for parole violations was completed on February 8, 1960 and Nowakowski was entered into the Western Diagnostic and Classification Center to begin serving the sentence of 3 to 7 years imposed by the Erie County Court for Burglary, Larceny and Receiving Stolen Goods. The records of the Center show that this sentence, to be effective from December 6, 1959 and that the minimum term expired on December 6, 1962. The maximum term would have expired on December 6, 1966.

While serving the sentence of 3 to 7 years, the said Edward John Nowakowski was taken to Allegheny County and on March 26, 1963 he was sentenced by the Court of Quarter Sessions of Allegheny County at No. 334 November Sessions, 1962 to serve 2½ to 5 years for Assault by Prisoner.

On June 4, 1964 by order of the Pennsylvania Board of Parole, Nowakowski was granted parole on the 3 to 7 year sentence and entered into the Western Diagnostic and Classification Center to begin serving the 4 to 10 year term imposed on him for Prison Breach. The records of the Center show this sentence to be effective from May 21, 1964 and that the minimum term will expire on May 21, 1968 and the maximum term on May 21, 1974.

The sentence of 2½ to 5 years imposed for Assault by Prisoner is recorded as a detainer and is to begin at the expiration of his 4 to 10 year sentence, presently being served at the State Correctional Institution at Pittsburgh, Pennsylvania.

II. *Habeas Corpus* Proceedings

Edward John Nowakowski began to file Petitions for Writ of *Habeas Corpus* to the Court of Common Pleas of Erie County, Pennsylvania, in 1959, at No. 212 May Term 1959. There followed additional petitions at 575 September Term 1959, 376 May Term 1960, 83 May Term 1962 and 420 September Term 1963. The next proceeding was taken to the Superior Court of Pennsylvania (Commonwealth of Pennsylvania *ex rel.* Nowakowski vs. Maroney, 194 Pa. Super. 24, 166 A. 2d 559). An appeal to the Supreme Court of Pennsylvania from a denial of a subsequent *habeas corpus* petition was denied. A petition was filed in the District Court of the United States for the Western District of Pennsylvania at No. 64-364, which was followed by another petition to the District Court at Civil No. 64-1087. In this proceeding, for the first time, Nowakowski was granted a hearing on his petition and a full evidentiary hearing was held with the assistance of counsel appointed by the Court. The order of United States District Judge Rabe F. Marsh, dated April 28, 1965, denying the petition for writ of *habeas corpus* appears in the record at R. 115. The opinion of Judge Marsh also contains a review of the various petitions for writ of *habeas corpus* filed by Nowakowski up to that date.

There followed an application for a re-hearing before the District Court which was denied on May 14, 1965 (R. 127).

Petitioner then applied for a certificate of probable cause to the District Court and this was issued on June 15, 1965 (R. 129). On the same day, petitioner filed Notice of Appeal to the Court of Appeals for the Third Circuit (R. 130). On July 19, 1965, petitioner, *pro se*, petitioned the Court of Appeals for an order granting him leave to ap-

peal *in forma pauperis*, that his cause be docketed without payment of costs or giving of security, that counsel be appointed and that he be given leave to proceed on hand written briefs. The Court of Appeals denied this petition (R. 135) and a subsequent petition for re-hearing was denied on October 4, 1965 (R. 140).

Summary of Argument

I.

The case of *Griffin v. Illinois*, 351 U. S. 12, does not apply to the instant case. The action by the Court of Appeals was clearly proper under the circumstances and was in no way based upon petitioner's indigent status. If the Court had ruled otherwise, in view of the long history of petitions for writ of *habeas corpus* filed by petitioner, one would be shocked.

Under the provisions of 28 U. S. C. 1915, the Court of Appeals may dismiss a case if satisfied that the action is frivolous or malicious. The Court has the authority to and actually does this whether or not the petitioner is represented by counsel, and the fact that they acted within the scope of their authority does not mean they were wrong in this case just because the petitioner was indigent. The statutory right to appeal under 28 U. S. C. 1291 from the denial of a writ of *habeas corpus* did not depend in this case upon the financial means of the petitioner and it is presumptious to contend that petitioner's appeal was turned down just because he was an indigent. It would be almost as unrelated to say that the petition was refused because petitioner's name was Nowakowski.

II.

It is not denied by petitioner that the Court of Appeals does have the right to exercise discretion under 28 U. S. C. 1915, and the fact that a certificate of probable cause may be issued does not deprive the Court of Appeals from exercising such discretion. The certificate of probable cause is a condition precedent to the right to appeal and does not constitute an adjudication of anything. *Egan v. Teets*, 251 F. 2d 571, 575.

It is mere conjecture to argue that a different result would have come about if the District Court had not issued a certificate of probable cause. Any number of possibilities may have occurred and not necessarily would the Court of Appeals have been obliged to appoint counsel for the petitioner and allow a full hearing on the question of petitioner's good faith.

ARGUMENT

I.

The action of the Court of Appeals in denying petitioner's petition did not constitute discrimination against an indigent defendant.

The Court of Appeals had before it the petition prepared by Nowakowski. Available to them also, was the opinion of Judge Marsh in the District Court (R. 115). A scrutiny of these documents would justify, in fact demand, a finding that no additional information upon which a sound judgment could be made, would be produced by further argument or further hearing. At this point, the Court of Appeals, with the materials they had before them could very reasonably decide that the petitioner's action was frivolous, therefore justifying dismissal. The fact that a certi-

ficate of probable cause had been issued by the judge of the District Court would not and should not have had any influence on the Court of Appeals. The only purpose served by that certificate was that it was necessary to allow the matter to reach review by the Court of Appeals.

The fact that petitioner believes or is even convinced in his own mind that his arguments are worthy of belief would not prevent a finding by the Court that his appeal is utterly frivolous. *U. S. v. Visconti*, 261 F. 2d 215, cert. denied 79 S. Ct. 743.

Should the Court of Appeals have granted the prayer of the Nowakowski petition just because of the indigent status of the petitioner even though they may have honestly felt that the appeal was frivolous?

In *Kremer v. Clarke*, 285 F. 2d 735, cert. denied 81 S. Ct. 1098, the court said, "Leave to appeal *in forma pauperis* should not be granted if appeal would be dismissed regardless of *pauperous* condition of appellant." The presumption should be that the decision of the Court of Appeals, in the instant case was in accord with this opinion.

Frivolousness is a ground for dismissing an appeal in *forma pauperis* and also a prepaid appeal. *Young v. U. S.* 267 F. 2d 692.

Because U. S. Court of Appeals was satisfied that the various papers of state prisoner before it presented nothing calling for relief by court, it would not indulge in idle gesture of appointing counsel. *Forsythe v. State of Ohio*, 33 F. 2d 678. *Shorten v. Markley*, 330 F. 2d 102.

Court of Appeals need only determine if there is substantial evidence in record to support denial of *habeas*

corpus below. *Gray v. Johnson,* 354 F. 2d 986, cert. denied 865 S. Ct. 1232.

Court of Appeals was bound by district judge's findings and conclusions which had ample factual and legal support in *habeas corpus* proceeding. *Root v. Cunningham,* 344 F. 2d 1, cert. denied 865 S. Ct. 135.

In passing upon propriety of district court's refusal to accord state prisoner *habeas corpus* relief, Court of Appeals will review no more than the issue passed upon by the lower court. *Young v. Wainwright,* 326 F. 2d 325.

It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals acting under this section, providing appeal from final order of circuit or district judge in *habeas corpus* proceeding, should be exercised. *Application of Burwell,* 76 S. Ct. 539, 350 U. S. 521.

These citations clearly set forth the authority vested in the Court of Appeals in a matter such as the case at bar. The spirit as well as the letter of the law granting discretion to the Court of Appeals is evident throughout these and many other reported cases. The exercise of such discretion is always necessary in these cases to a lesser or greater extent and it should be only on evidence of the most flagrant abuse that such a discretionary finding be overruled.

A. It is admitted that any procedural device for screening appeals by indigents is invalid if it impinges upon the right of the litigant to equal consideration before the Courts.

The cases cited by petitioner all refer to the right of an indigent defendant to an adequate appellate review of a criminal conviction. *Griffin v. Illinois,* 351 U. S. 12,

Lane v. Brown, 372 U. S. 477, *Draper v. Washington*, 372 U. S. 487 and *Douglas v. California*, 372 U. S. 353.

In the present case petitioner had adequate opportunity for appeal and had actually filed a motion for a new trial which was refused. In addition, the five petitions to the Court of Common Pleas of Erie County, appeal to the Superior Court of Pennsylvania, appeal to the Supreme Court of Pennsylvania and two separate petitions to the District Court of the United States, one of which involved a full evidentiary hearing at which petitioner was represented by Court appointed counsel, certainly afforded review of defendant's conviction.

The position of Nowakowski before this Court cannot be compared with the position of the petitioner's in the cases cited above where state procedures hindering appeal were involved. If the State of Pennsylvania had imposed rules which made it more difficult for the petitioner to appeal his conviction then the authorities cited would be in point. There is no claim that Pennsylvania denied Nowakowski, he being indigent, an adequate appellate review of his criminal conviction.

B. The Court of Appeals has applied the provisions of 28 U. S. C. 1915 precisely and indigents are not denied the same rights of appeal as are afforded to men of means.

An appeal from a conviction before a District Court must be allowed as a matter of right. In *Coppedge v. U. S.*, 369 U. S. 438, the petitioner was convicted in the District Court and his application for leave to appeal to the Court of Appeals was denied. There, it was the ruling of this Court, "We hold petitioner has not yet received the benefits of presenting either oral arguments or full briefs on the merits of his claim to the court first charged with the

supervision of the trial Court." Thus, can be seen the analogy between *Coppedge* and the *Griffin, Lane v. Brown, Draper* and *Douglas* cases cited previously, in all of which cases the right to appeal to the "court first charged with the supervision of the trial Court" was said to be a matter of right not to be denied an indigent appellant.

There has been no adequate showing that an indigent petitioner would not receive the same consideration under 28 U. S. C. 1915 as a paying petitioner would receive. *Johnson v. U. S.*, 352 U. S. 565 and *Ellis v. U. S.*, 356 U. S. 674, 675 both provide that an appeal *in forma pauperis* must be allowed in a criminal case, "*unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant.*" This language certainly does not mean that the procedures set forth in 28 U. S. C. 1915 are discriminatory against indigents, and no question as to the constitutionality of this section of the Code has ever been raised in opinions of the Supreme Court.

II.

The issues raised by petitioner could properly be determined to be frivolous without further briefing and oral argument, despite the fact that the District Court had issued a certificate of probable cause.

The issue before the District Court was the question of whether or not petitioner had been denied the effective aid and assistance of counsel at the time of his trial before the state court.

A. The claim of denial by a state of the effective assistance of counsel can properly be raised in a federal *habeas corpus* proceeding.

The issue of effective representation by counsel at the time of trial was a proper question submitted to the Dis-

trict Court on petitioner's petition for writ of *habeas corpus*. This was the sole question involved in the amended petition which was filed and upon which the District Court held a full hearing. Petitioner was represented by counsel at this hearing appointed by the District Court. The record of that hearing (R. .) is before this Court.

A review of the record before the District Court raises the strong conclusion that no further testimony or available evidence and no additional argument on behalf of petitioner would strengthen petitioner's case. What more could be said in petitioner's behalf in support of his petition? This record was before the Court of Appeals and could constitute such sufficient substantial evidence as to dismiss the petition of Nowakowski. In *Gray v. Johnson*, 354 F. 2d 986, cert. denied 86 S. Ct. 1232, it was held, "Court of Appeals need only determine if there is substantial evidence in record to support denial of *habeas corpus* below." And in *Root v. Cunningham*, 344 F. 2d 1, cert. denied 86 S. Ct. 135, the court ruled, "Court of Appeals was bound by District Judge's findings and conclusions which had ample factual and legal support in *habeas corpus* proceeding."

It is stated in the opinion, *Murray v. State of Louisiana*, 347 F. 2d 825, "Court of Appeals on appeal from denial of federal *habeas corpus* relief, could take judicial notice of prior state petitions filed by petitioner.

The Court of Appeals in the instant case had adequate information before them to justify dismissal of the Nowakowski petition. As stated previously, the fact that a certificate of probable cause had been issued by the District Court Judge did not become a matter of evidence before the Court of Appeals. This certificate was a requirement of appeal and served that purpose only. The reasons

why a certificate of probable cause may have been granted by the District Judge are not an adjudication of anything. *Egan v. Teets,* 251 F. 2d 571, 575; and are not authoritative, *Thomas v. Duffy,* 191 F. 2d 360, 361.

B. The arguments concerning effective aid of counsel raised by petitioner were presented at the time of hearing before the District Court.

The record of the proceeding before Judge Marsh (R.) fully sets forth the allegations of petitioner that he was not effectively represented by counsel at his trial in the state court. Yet it is interesting, as pointed out by Judge Marsh (R.), that petitioner complimented his court appointed attorney on his handling of the trial and, as further stated, "It is evident that relator was in fact well satisfied with Mr. Morgan's efforts at the trial because in his first two petitions for the writ, presented in the state court in 1959, he did not express any dissatisfaction with Mr. Mangan's services at the trial.

The District Court opinion, goes on (R.) "In two state court petitions for the writ, No. 575 September Term, 1959 (petition Ex. E. p. 24) and No. 83 May Term, 1962 (petition, Ex. F. p. 70), relator stated that he "and his counsel made lots of efforts to try to locate said witness (Mrs. Servidio) which would prove that petitioner could not possible committed said crime; but could not until after the trial (*sic*)."

In the third petition filed in the Court of Common Pleas of Erie County by petitioner, Judge Samuel J. Roberts, who had presided at the trial and who is now a Justice of the Supreme Court of Pennsylvania, stated (R.) "This contention is unsupported by the record and without merit. An examination of the record indicates clearly that he was

adequately and competently represented by alert counsel throughout the entire trial * * *.

Our review of the record satisfied us again that petitioner had a fair and impartial trial upon the merits, that he was properly represented by competent counsel during all phases of the trial and that the jury returned a proper verdict." This decision was affirmed by the Superior Court of Pennsylvania upon the opinion of the trial judge. *Commonwealth ex rel. Nowakowski v. Maroney,* 194 Pa. Super. 24, 166 A. 2d 559.

An appraisal of the evidence concerning the manner in which the attorney representing the petitioner at the time of trial, conducted himself is set forth on pages 6, 7, 8 and 9 of Judge Marsh's opinion (R.). No further argument need be advanced regarding the effectiveness and competency of Attorney Mangan's defense of Nowakowski at the trial in the state court. The trial judge and the Federal District Court Judge who presided at a full hearing and heard arguments concerning the charge of ineffective and incompetent counsel, have made their views a matter of record, part of the record before this Court and it is submitted that these opinions are more than adequate to rebut the arguments of petitioner's counsel in his attempt to show that Nowakowski had and has a valid argument for a writ of *habeas corpus* and that the Court of Appeals should not have dismissed his petition as being frivolous.

CONCLUSION

For the reasons stated the orders of the Court of Appeals should be sustained.

Respectfully submitted,

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February, 1967.